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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Your petitioners are pension plan beneficiaries prevented by wrongful interference in violation of ERISA § 510, 29 U.S.C. § 1140 of the Employee Retirement Income Security Act ("ERISA") from augmenting their respective levels of pension benefit eligibility. The issues presented primarily concern the proper interpretation of this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter referred to jointly as *Mertens/Great-West*). These are the questions presented:

I.

In cases of violation of ERISA § 510 — the provision of ERISA designed to ensure that employers will not interfere in the attainment by employees of ERISA benefits — should the equity enforcement power of ERISA § 502(a)(3) be considered capable of correcting the violation even if doing so has the effect of qualifying the aggrieved employees for present or future monetary benefits?

II.

If the element of monetary relief prevents correction of an ERISA § 510 violation under ERISA § 502(a)(3), can the benefits for which the employees were wrongfully prevented from qualifying be awarded under ERISA § 502(a)(1)(B)?

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OPINIONS BELOW

The decision for which review is sought, entitled *Eichorn v. AT&T Corp.*, is reported at 484 F.3d 644 (3d Cir. 2007) and appears as Appendix A. The denial of petitioners' request for rehearing and rehearing en banc, including the concurring opinion of the Honorable Thomas L. Ambro, Circuit Judge (which is tantamount to a dissent), is reported at 489 F.3d 590 (3d Cir. 2007), and appears as Appendix C.

STATEMENT OF JURISDICTION

The Third Circuit denied a timely petition for rehearing and rehearing en banc on May 31, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil enforcement provision of ERISA, § 502(a), 29 U.S.C. § 1132(a), provides in relevant part that

> a civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter

> or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan.

The substantive rights at issue arise under ERISA § 510, 29 U.S.C. § 1140:

> Interference with protected rights
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for ... the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

STATEMENT OF THE CASE

The facts as stated herein were taken as true for purposes of the lower court motion practice that resulted in summary judgment dismissing the case.

Petitioners are victims of wrongful interference in the attainment of pension benefits in violation of ERISA § 510. They were prevented by the court below, in supposed obedience to the dictates of this Court's previously cited *Mertens* and *Great-West* decisions, from obtaining a court-ordered change in their pension eligibility status under § 502(a)(3). The Circuit Court viewed petitioners' action as one for money damages not traceable to wrongly held property, and as such not a claim for equitable relief within the purview of § 502(a)(3).

At the same time, petitioners were denied relief under § 502(a)(1)(B) because in the absence of an adjustment to

their eligibility status, they had no claim for money currently due them under the terms of the applicable pension plan.

Petitioners are former employees of Paradyne Corp. ("Paradyne"), a one-time subsidiary of respondent AT&T Corp. ("AT&T"). Paradyne manufactured network access products for the telecommunications industry, many of which it supplied to AT&T operations. As Paradyne employees, petitioners were entitled to AT&T pension benefits, which included "bridging rights." If employees left any of the present or former AT&T companies and were employed by another within six months, the employees could "bridge" the terms of employment and continue accruing pension credit for future service as if they had never left.

In July of 1995, AT&T announced its decision to sell Paradyne. AT&T wished to continue to use Paradyne as a supplier to itself and its affiliates (including respondent Lucent Technologies Inc., hereinafter "Lucent"), and wanted Paradyne to retain its skilled workforce.

Shortly thereafter, AT&T announced a business reorganization plan (hereinafter "the trivestiture") that transformed AT&T itself into three independent companies: AT&T, Lucent (sometimes referred to jointly with AT&T as "AT&T/Lucent"), and respondent NCR Corp. As part of the trivestiture process, AT&T transferred ownership of Paradyne to Lucent, which soon carried out the already-announced sale of Paradyne. The buyer was respondent Texas Pacific Group ("TPG"), which was unwilling to buy Paradyne if the purchase entailed continuing Paradyne's pension plan.

In the course of the announced sale of Paradyne, the transfer of Paradyne from AT&T to Lucent and its sale by Lucent to TPG, the respondents entered into various measures and agreements that had the effect of destroying the plaintiffs'

bridging rights. Plaintiffs' pensions were eliminated if they worked for TPG, and plaintiffs were prevented from retaining their pension rights by transferring to another AT&T affiliate as contemplated in the bridging rights. The end result had the practical effect of preventing the Paradyne employees from continuing to accrue pension benefits.

The Third Circuit's 2001 decision reversing the dismissal of plaintiffs' § 510 claim recognized that evidence offered by plaintiffs to support their ERISA claim was sufficient to permit a reasonable finder of fact to determine that loss of the pension benefits was not only the result of the restrictions on hiring, but was the object and purpose of those restrictions. *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert denied*, 534 U.S. 1014 (2001).

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS ISSUES OF PUBLIC IMPORTANCE.

(A) The importance of this case is manifested by widespread commentary and judicial dissatisfaction with narrow interpretations of ERISA's enforcement provisions, particularly as applied to ERISA § 510.

ERISA § 510 was described by the Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), as "a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143. The public importance of the decision for which review is presently sought springs from its practical effect, which is to nullify the provisions in ERISA § 510 prohibiting interference with the attainment of ERISA benefits.

Although the circuits are divided on the point, the court below, as later explained herein, joined with at least one other

circuit in finding that equitable relief under ERISA's enforcement mechanism (§ 502) was too narrow to compel modification of the employer's benefit records where the effect would be to confer monetary benefits.

Public importance is also apparent from the outpouring of scholarly commentary from the judiciary, academia and elsewhere critical of the restrictions imposed by the *Mertens* and *Great-West* decisions on the relief available under § 502(a)(3), and especially critical of emanations from those decisions that have led lower courts in this and other cases to impose even sharper restrictions on statutory protection of employee benefits.

The importance of this case is heightened by the gravity of the subject matter, involving as it does the safeguarding and protection of employee pension plans and welfare benefit plans on which millions depend for health care and old-age subsistence.

To the lengthy bibliography of scholarly writings and judicial opinions collected in the concurring opinion of Circuit Court Judge Thomas L. Ambro in the court below (Appendix C), all of them critical of the rule emerging from the *Mertens*, *Great-West* opinions and the earlier case of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), there must now be added Judge Ambro's own forceful message to this Court, calling on the Court to recognize the unfairness of a result which in his words is "[n]owhere . . . more apparent than in this case." Appendix C at 35a.

Judge Ambro obviously regards the combined impact of this Court's rulings as producing results of questionable soundness. His concurrence is the anguished plea of a jurist prevented by conscience from rationalizing injustice, but

forced to administer it through rote application of rigid and unworkable rules that only this Court can correct.

A similar attitude of resignation and regret was expressed in *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004), where the court declared itself "not unsympathetic to Plaintiffs' situation," *id.* at 1260, but considered itself bound by precedent to deny a remedy for a § 510 violation. The dissent in *Millsap* (by the Honorable Carlos F. Lucero, Circuit Judge) went further by protesting, "Not only does the majority's holding fail to deter ERISA violations," but that holding produces a result under which "the most egregious offenders could be subject to the least sanctions." *Id.* at 1261.

The one case that is arguably supportive of the result reached in *Eichorn*, although it involved peculiar and distinguishing facts, is the unofficially reported Sixth Circuit case of *Alexander v. Bosch Auto Systems*, 2007 U.S. App. LEXIS 11694, 19-20 (6th Cir. 2007). The court in that case ruefully concluded that it was forced to leave the victims of "a conceded statutory violation without a remedy." The court also noted, "Our somewhat discomfiting resolution of this case is similar to that which occurred in *Millsap*. . . . We are likewise not calloused to Plaintiffs' distressing situation."

The paradoxical and unsatisfying results reached in this and other § 510 cases purporting to be based on controlling precedent also invite attention to the broader concerns of the late Edward R. Becker, then Chief Judge of the Third Circuit, with what he described as "an unjust and increasingly tangled ERISA regime." (Concurring opinion in *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003).) Elsewhere in the same opinion Judge Becker referred to "extraordinary subtleties and complexities in this area of the

law that cry out for clarification by the Congress or failing that, by the Supreme Court." *Id.* at 461.

In her concurring opinion in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), Justice Ginsburg called this Court's attention to Judge Becker's views as expressed in *DiFelice*, and explained her own dismay with the pathways followed by lower courts in their interpretation of this Court's rulings. This led Justice Ginsburg to repeat Judge Becker's entreaty, "The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable." 542 U.S. at 223.

(B) The Third Circuit ruling is important because it nullifies key employee protections based on distinguishable interpretations of employees' enforcement rights that did not require harmonizing different sections of the same enactment.

The lower court's near-total evisceration of ERISA § 510 as a tool for preventing interference with the attainment of ERISA-protected benefits is the primary reason for reviewing this case. As ERISA preempts all state remedies, including tortious interference, § 510 provides the only possible remedy for interference with benefit attainment.

Section 510 makes it unlawful to interfere with the attainment of the right to benefits available to plan participants, and concludes by declaring, "The provisions of section 1132 [ERISA § 502] shall be applicable in the enforcement of this section."

Enforcement of ERISA through civil actions was identified by Congress as a prime statutory objective in ERISA § 2(b), 29 U.S.C. § 1001(b), wherein Congress

declared that its intention was to protect "the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

The issue concerning enforcement of § 510 by civil action, therefore, is not whether Congress intended it, but whether meaningful fulfillment of that intention has been obstructed by flaws or imperfections in statutory draftsmanship or by erroneous judicial interpretations.

As articulated by Judge Ambro, the only opportunities for prosecuting interference-type § 510 violations not foreclosed by the lower court's decision involve situations too unlikely of occurrence to provide any serious enforcement potential. Even in those situations, moreover, the relief is essentially theoretical, since as Judge Ambro explained, it can be readily defeated by resort to the tactic of delay. *See* Appendix C at 37a-38a.

Resolution of the division between the courts on this subject (discussed in Section C below) can be accomplished through settled canons of statutory construction that require § 502 and § 510 to be read *in pari materia*, so that proper effect can be given to each. "A statute should be construed so that effect is given to all its provisions . . . and so that one section will not destroy another." 2A Singer, *Sutherland Statutory Construction*, § 46.06 (6th ed. 2000). *See also Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . .") and *Richards v. U.S.*, 369 U.S. 1, 11 (1962) ("A section of a statute should not be read in isolation from context of the whole act . . .").

(C) This case is important because it highlights inter-circuit conflicts over the proper interplay between money damages and equitable relief, particularly as regards equitable power to compel adjustment of employers' benefit records to correct for interference with benefit attainment.

More than any other, this case exemplifies the strained extreme to which the teachings of *Mertens/Great-West* on the supposed incompatibility of equity and monetary relief can be carried. All of the injury for which respondents are responsible is correctable by an equitable decree compelling revision of each plaintiff's benefit eligibility status by crediting each plaintiff with some measure of additional service time to compensate for what was wrongfully denied.

Part II of this petition, dealing with conflicts between the circuits, will more fully describe the decisions by circuit courts that are in conflict with the Third Circuit in this case, notable two Ninth Circuit cases, *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), and *Enniss v. Enniss*, unofficially reported at 198 Fed. Appx. 594 (9th Cir. 2006), as well as two decisions from the Tenth Circuit, *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) and *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004). The conflict lies in the willingness of the courts in these cases to use § 502(a)(3) to command affirmative changes affecting benefit entitlement, without regard to the impact of such changes on monetary benefits.

The unofficially reported case of *Alexander v. Bosch Auto Systems*, *supra*, reluctantly reached the same conclusion as the Third Circuit on the limits of § 502(a)(3) jurisdiction as will be seen in Part II, *infra*.

The equitable decrees approved in *Mathews*, *Millsap* and *Wal-Mart* were issued in reliance on this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and were deemed fully consistent with this Court's more recent *Mertens/Great-West* decisions.

The court below sought to distinguish *Varity* on the ground that the claimants in that case were deserving of equitable adjustment because the corporate subsidiary that employed them, and the different subsidiary of the same company that was ordered to enroll them as participants in its benefit plan, were parts of a common enterprise. Thus in *Varity*, but not in this case, the court below reasoned, an equitable remedy could be justified because it was measurable by the employer's gain and not merely by the employee's loss. Appendix A at 24a-25a.

The important point now in need of resolution is whether such a distinction has any validity where, as here, it was the defendants themselves who barred plaintiffs from remaining in defendants' employ, while at the same time benefiting from plaintiffs' continued services, resulting in material gain to defendants and direct loss to plaintiffs through inability to augment pension benefits. What the lower court ignored, therefore, was the common advantage to TPG, AT&T and Lucent, as either buyers or sellers of Paradyne products, through the reduced costs of producing such products without pension expense.

On the separate issue of what constitutes "money damages" for purpose of enforcement under § 502, the court below added to the restrictions on relief available under § 502(a)(3) as promulgated by this Court, by expanding the concept of money damages as an obstacle to equitable relief. Without discussing the point, the court treated as money

damages everything plaintiffs ultimately hoped to achieve, including monthly pension payments that might or might not become due for future periods. Appendix A at 22a.

Mertens, *Great-West* and *Massachusetts Mutual* were all properly classified as money damage cases because the claimants in each instance, had they been successful, would have obtained money judgments for the full amount of all provable losses. Calling those cases money damage claims on the basis of that characteristic finds validation in Dobbs, *Law of Remedies* § 3.1 (2d Ed. 1993), pp. 277-278:

> The damage remedy is not conditional, and is not payable periodically as loss accrues unless a statute so provides. So the damage award is traditionally made once, in a large sum to compensate for all the relevant injuries, past and future.

Among the petitioners, however, only those currently retired could have qualified for immediate payments, and only in amounts sufficient to adjust for shortfalls in prior pension checks. The primary objective for most if not all of the petitioners, therefore, is vouchsafing the right to enhanced *future* payments which, like all pension payments, would have been contingent on each participant's continued survival. Nothing in *Massachusetts Mutual*, or in *Mertens*/*Great-West*, compels affixation of a fatal "money damages" or "legal remedy" label to a decree that merely conduces toward the periodic future payment of money not yet due, much less, as in this case, money not certain to become due. On the contrary, numerous cases, including this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), leave no doubt that decrees compelling or otherwise affecting entitlement to *future* payments — described in *Bowen* as "prospective" in contradistinction to "retrospective"

payments, *id.* at 890-891 n.14 — are not money damage awards, but represent equitable relief. A fuller account of those cases is reserved for Part II of this petition, as the cases also represent prime examples of circuit court and Supreme Court cases in conflict with *Eichorn*.

To summarize the foregoing, it is difficult to imagine a case that could more dramatically reveal the necessity for eliminating confusion as to the proper boundary between equitable relief claims which qualify for § 502(a)(3) jurisdiction, and money damage claims which do not.

(D) This case also provides an appropriate vehicle for determining whether the intertwining of monetary damages and equitable relief, if not achievable under ERISA § 502(a)(3), can be effected instead under § 502(a)(1)(B).

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990), this Court described its earlier decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), as having "explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510."

This Court has not yet decided whether claims under § 510 can be enforced only under § 502(a)(3), as several lower courts have concluded,[1] or whether it is equally

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1. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1247 (10th Cir. 2004); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir. 1993); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir. 1990); *Russell v. Northrop Grumman Corp.*, 921 F. 142 (E.D.N.Y. 1996).

permissible, as other courts have held, that § 510 claims can also proceed under § 502(a)(1)(B).[2]

Crosby v. Bowater Inc. Retirement Plan, 382 F.3d 587 (6th Cir. 2004), involved a claim for underpayment of lump sum retirement benefits which the plaintiff opted to bring under § 502(a)(3), well knowing that plan language dealing with the methodology for calculating benefits made it pointless to proceed under § 502(a)(1)(B). The court on appeal vacated the district court's award in plaintiff's favor, saying that as an order to pay money, it represented "relief not typically available in equity," and "not available under the statutory provision on which the plaintiff elected to base his claim." *Id.* at 589. The appellate court implied but did not specifically hold that a claim under § 502(a)(1)(B), while perhaps not beneficial under the particular circumstances, would have presented a justicible claim.

The present petitioners have at every stage argued their right to be heard under either or both subsections. Accordingly, there will likely be no better opportunity for the Court to resolve this additional inter-circuit conflict.

Section 502(a)(1)(B) should be seen as especially deserving of this Court's scrutiny because of its distinct potential for alleviating the harsh results courts have felt compelled to reach in previously mentioned cases, often on the largely undebated assumption that subsection 502(a)(3) provides the only remedy for a § 510 violation.

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2. *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988), *appeal after remand*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990); *Babich v. Unisys Corp.*, 1994 U.S. Dist. LEXIS 4744, 1994 WL 167984, at *3 (D. Kan. 1994); *Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1290 (D. Kan. 1993), *aff'd*, 72 F.3d 822 (10th Cir. 1995).

Courts in the comparatively small number of § 510 cases that were in fact allowed to proceed under § 502(a)(1)(B) were faced with the question, not presented here, of whether the plaintiffs, as avowed seekers of legal damages, were entitled to trial by jury. The courts in all such cases concluded that trial by jury was inappropriate because legal relief was only *part* of what § 510 claimants actually needed. As the court in *Adams*, *supra*, put it, the claimants in such cases "have no entitlement to the benefits unless and until a court exercises its equitable powers to decree Plaintiffs eligible beneficiaries of the plan." 149 F.3d at 1161.

Such legal relief as is involved in § 510 cases was accordingly described by *Adams* as "incidental to or intertwined with injunctive relief," 149 F.3d at 1161, using language borrowed from *Tull v. United States*, 481 U.S. 412, 424 (1987), and repeated in *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 571 (1990).

The utility of § 502(a)(1)(B) as a source of both legal and equitable relief is apparent not only from those cases, but from the statute itself. Only the first clause of (a)(1)(B), "to recover benefits due [to the participant or beneficiary] under the terms of his plan," describes a claim analogous to an action at law. As for the second clause, "to enforce his rights under the terms of the plan," it was ironically the Third Circuit itself in *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), that described a suit "that fits within the second clause of section 502(a)(1)(B)" as "patently equitable in nature." *Id.* at 650. The third clause, "to clarify his rights to future benefits under the terms of the plan," can scarcely be seen as authority for anything other than equitable rulings and declarations.

Once it is recognized that § 502(a)(1)(B) provides both legal and equitable relief, the only remaining question is whether anything in the structure or composition of subsection (a)(1)(B), or of ERISA in general, prevents courts from combining the two forms of relief to meet the exigencies of a § 510 violation.

Jurisdiction under subsection (a)(1)(B) is limited to matters affecting plan benefits. Accordingly, the use of this subsection to obtain benefits withheld in violation of § 510 would not logically conflict with prior decisions of this and other courts that have denied recovery to ERISA claimants seeking make-whole relief, meaning consequential damages. Since your petitioners do not seek compensation for lost jobs, emotional distress or other tort-like damages that occupied the primary attention of the courts in cases such as *Mertens/ Great West* and their progeny, including such recent cases as *Millsap*, *supra*, and *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005), these cases present no obstacle to the recovery of benefits *vel non* under § 502(a)(1)(B).

To petitioners' knowledge, the only reason thus far advanced for opposing the use of § 502(a)(1)(B) to obtain benefits withheld in violation of § 510 partakes of the surreal. As the cases cited in Footnote 1 would have it, § 502(a)(1)(B) is unavailable because § 510 claimants are by definition seeking benefits they did not obtain, and thus are not seeking benefits shown as owing on the employers' records. Yet when such claimants seek to invoke § 502(a)(3) to compel revision of such records, they are rebuffed with the explanation that their ultimate goal of money damages disqualifies them for equitable relief.

But if courts totally devoid of equity jurisdiction are incapable of rescuing justice from that Kafkaesque conundrum, such should not be the case with a court empowered to combine legal and equitable relief under § 502(a)(1)(B). In its equity capacity, such a court can instantly engage and overcome the problem through literal application of the familiar maxim, "Equity regards that as done what ought to be done." *Independent Wireless Telegraph Co. v. Radio Corporation of America*, 269 U.S. 459 (1926); *Howe v. Varity Corp.*, 36 F.3d 746, 756-57 (8th Cir. 1994), *aff'd sub nom Varity Corp. v. Howe*, 516 U.S. 489 (1996). Under this concept, an ultimate decision in the employees' favor becomes retroactive recognition of an *ab initio* entitlement to plan benefits or credits.

Benefit recovery actions under § 502(a)(1)(B) have the additional advantage of avoiding entanglement with the concept of "traditional equitable relief" as *Mertens/Great-West* defined it, based on a parsing and analysis of words that appear only in § 502(a)(3). Jurisdiction under § 502(a)(1)(B), therefore, should empower an equity court to award incidental monetary relief, and conversely permit a court functioning as a court of law to provide any needed ancillary or incidental equitable relief.

Granting claimants the right to a remedy under § 502(a)(1)(B) for plan benefits or credits under § 510 would substantially alleviate dissatisfaction within a judiciary that supposes itself bound to use § 502(a)(3) as its only compass, and is now forced against its will to rebuff victims and allow violators to retain their wrongful gains.

II. CONFLICTS BETWEEN THE CIRCUITS, AND BETWEEN THE DECISION OF THE COURT BELOW AND A PRIOR DECISION OF THIS COURT, ARE SUBSTANTIAL AND INVOLVE IMPORTANT FEDERAL QUESTIONS.

(A) Inter-circuit conflicts abound.

There are real and substantial conflicts between the circuit courts as to whether anything in *Mertens/Great-West* prevents the exercise of equitable jurisdiction under § 502(a)(3) in order to redress the type of harm suffered by plaintiffs in this lawsuit. *Eichorn* stands on one side of the divide, reluctantly joined as aforesaid by *Alexander v. Bosch Auto Systems, supra. Alexander*, moreover, was driven by special facts that would have made it difficult to decide the case differently: What the plaintiffs in that case were requesting was not mere amendment of plan records, but a revision of the plan itself.

Among the cases decided subsequent to *Great-West* that solidly support the position advocated by petitioners, and that sharply conflict with the court below, the most prominent is the previously cited Ninth Circuit decision in *Mathews v. Chevron Corp.*, 362 F.3d 1172.

Although not a § 510 case, *Mathews* was similar to the present case in that the plaintiffs were seeking "equitable relief awarded pursuant to ERISA section 502(a)(3) . . . requiring [the employer] to modify its retirement plan records." 362 F.3d at 1176. *Mathews* was based on the employer's slowness in disclosing how it would accomplish a planned downsizing of its workforce, which in its final form offered enhanced pension benefits to the involuntarily terminated employees. The named plaintiffs were eight employees who had voluntarily retired in reliance on prior

announcements that the downsizing would not be accomplished by benefit enhancement. The relief demanded was alteration of the plan records to reclassify the *Mathews* plaintiffs as involuntarily terminated in order to qualify them for the enhanced benefits.

The circuit court in *Mathews* upheld the decision of the district court granting the requested relief, and rejected the employer's contention that under *Great-West*, an injunction requiring modification of its retirement plan records should be classified as legal rather than equitable relief. The *Mathews* employer's theory, although unsuccessful in the Ninth Circuit, is the theory adopted by the Third Circuit in the present case: Relief under § 502(a)(3) was held unavailable because the claimants ultimately sought "compensation for loss resulting from the defendant's breach of legal duty." *Mathews*, 362 F.3d at 1186.

Further explaining its disagreement with what the employer was arguing, the court in *Mathews* observed, "[A]n order to modify plan records" was not "[o]n its face an award of monetary damages," and that by "instating the plaintiffs retroactively" into the plan the order was also "equitable in substance." 362 F.3d at 1186. Tracking the logic of this Court's decision in *Varity Corp. v. Howe*, *supra*, 516 U.S. at 495, the court in *Mathews* added, "If 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." 362 F.3d at 1186.

The decision of the Tenth Circuit in *Millsap*, *supra*, is also a post-*Great-West* case in conflict with the decision below. *Millsap* arose, like the present case, under § 510.

Millsap came before the circuit court with major issues already resolved. No appeal had been taken from the district

court's finding that the defendant employer violated § 510 by closing a particular plant and terminating everyone employed there, all for the purpose and with the intent of avoiding future pension and health coverage costs. By stipulation, the parties had also agreed on the amount payable to the class members for the value of their lost pension and health care benefits. All that remained was for the appellate court to determine whether in the light of *Great-West*, "appropriate equitable relief" under § 502(a)(3) could be made to include, as part of the relief available for a § 510 violation, compensation in the form of back pay for loss of employment itself, as distinct from the loss of ERISA-governed benefits. 368 F.3d at 1248.

Millsap decided that issue in favor of the employer. It did so, however, for reasons placing the Tenth Circuit squarely in conflict with the decision below.

Millsap concluded that because § 510's "purpose is to protect the participants *in employee benefit plans*" (*Id.* at 1259 — emphasis by the court), claims for lost wages do not stand on the same protected footing as claims for lost benefits. As your petitioners lost only pension benefits and not jobs, the relief the Third Circuit denied petitioners would have been granted in the Tenth Circuit on the authority of *Millsap*.

Still another § 502(a)(3) case from the Tenth Circuit, *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, *supra*, involves dissimilar facts, but nevertheless conflicts with the Third Circuit's interpretation of *Great-West* as requiring denial of equitable relief merely because doing so would advance an ultimate goal of recovering money benefits. The court in *Wal-Mart* observed, "After all, any equitable relief, including those forms explicated by the [Supreme] Court as available under

§ 502(a)(3), must involve the direct or indirect transfer of money, and we cannot read the statute to proscribe all forms of relief." *Id.* at 1125.

Other cases, although decided prior to *Mertens/Great West*, conflict in principle with the present case to the extent that they illustrate cogent theories for achieving justice in cases of the sort here presented, and do so without conflicting in any way with *Mertens/Great West*. One such case, *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), concerned the plaintiffs' eligibility under the terms of a severance plan. The plaintiffs, who had opted to proceed as claimants for money damages under § 502(a)(1)(B), insisted they were entitled to trial by jury. The court disagreed, citing *Tull v. United States*, 481 U.S. 412, 424 (1987), for the proposition that "[a]n award of money damages may be considered an equitable rather than legal remedy" if the award is "incidental to or intertwined with injunctive relief." *Id.* at 1161. To emphasize that the claim for money damages was only part of the case, the court in *Adams* added:

> What Plaintiffs overlook, however, is the fact they have no entitlement to the benefits unless and until a court exercises its equitable powers to declare Plaintiffs eligible beneficiaries of the plan and thus order Defendants, as fiduciaries, to pay benefits.

Id.

Your petitioners have consistently argued that their remedies should not be limited to § 502(a)(3) but, as in *Adams* and the Third Circuit's own earlier decision in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988), *appeal after remand*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), should in the alternative include the right to

combine legal and equitable relief within the confines of § 502(a)(1)(B).

It does not appear that this Court has previously addressed the separate issue of whether § 502(a)(3) is the exclusive remedy for violations of § 510, or if such violations can also be remedied under § 502(a)(1)(B). The existing conflict between circuit courts on this issue was detailed by the court below. (Appendix A at 15a-17a.)

This Court should resolve these inter-circuit conflicts and clarify the contours of ERISA remedies for § 510 violations.

(B) The decision below conflicts with this Court's *Varity* and *Bowen* decisions, and with circuit court decisions which, like *Bowen*, regard orders compelling future payments as equitable relief.

The Third Circuit's 2007 *Eichorn* decision is not reconcilable with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). This Court in *Varity* considered it a proper exercise of equitable jurisdiction under § 502(a)(3) to reinstate the plaintiffs as participants in a medical benefit plan to compensate for injury resulting from the employer's fraud in inducing them to switch jobs.

The Ninth Circuit in *Mathews*, *supra*, saw *Varity* as authority for identical relief under virtually identical circumstances. The factually inapposite grounds on which the court below attempted to distinguish *Varity* have been noted in Part I, Section C of this petition.

The decision in this case is also in conflict with a comparatively minor aspect of this Court's decision in *Bowen v. Massachusetts*, *supra*. *Bowen* involved a federal court action brought by the Commonwealth of Massachusetts to

set aside an administrative order which disallowed the Commonwealth's claim for reimbursement of health care expenditures under a federally-assisted Medicaid program. The primary issue before this Court was whether the claim for past-due reimbursement was an action for money damages, and as such barred by sovereign immunity, owing to the lack of any statutory waiver of such immunity for claims of that description.

The majority and dissenting opinions in *Bowen* differed on whether past-due reimbursement could avoid the "money damages" classification. However, unanimity of opinion regarding the equitable character of an order affecting entitlement to future payments, even if equivalent to an award for the future payment of the money itself, was made clear in Justice Scalia's dissent:

> I agree with the Court that sovereign immunity does not bar respondent's actions insofar as they seek injunctive or declaratory relief with prospective effect. An action seeking an order that will prevent the wrongful disallowance of future claims is an action seeking specific relief and not damages, since no damage has yet occurred.

487 U.S. at 921-922.

The Third Circuit's unwillingness to recognize that orders affecting future payments are not money damage claims also puts it in conflict with the Tenth Circuit in *Callery*, *supra*, 392 F.3d at 407. *Callery* denied that the case before it could qualify for equitable relief under ERISA § 502(a)(3), but held that court-ordered changes "to affect the beneficiary's ability to receive future payments" was "a clear equitable remedy and is distinct from the relief sought in this case," 392 F.3d at 407, citing *Downie v. Independent*

drivers Ass'n Pension Plan, 934 F.2d 1168, 1170-1171 (10th Cir. 1991).

To forestall criticism that it was transgressing prohibitions on the use of ERISA § 502(a)(3) to award money damages, the Ninth Circuit in the previously cited *Enniss* case denied that it was compelling performance of "a *past due* monetary obligation," (quoting from *Great-West* — emphasis supplied by the court), but was instead ordering the employer "to fulfill a future obligation." 198 Fed. Appx. at 596.

Measured against these precedents, the outcome of this case suggests more than mere failure to apply the correct rule of law on claims for future ERISA benefits. It suggests that in the aftermath of *Mertens/Great-West*, there is a rising tide of negativity toward ERISA claimants generally that this Court, based on the *Eichorn* experience, can confront and correct.

III. THE ISSUES PRESENTED CAN APPROPRIATELY BE REVIEWED IN CONJUNCTION WITH THE CASE OF *LaRUE v. DEWOLFF, BOBERG & ASSOCIATES, INC.*, 127 S.Ct. 2971 (2007), WHICH IS ALREADY BEFORE THE COURT.

This Court has granted certiorari in the case of *LaRue v. DeWolff, Boberg & Associates, Inc.*, 127 S.Ct. 2971 (2007). *LaRue* was decided by the circuit court under ERISA § 502(a)(2), and is reported at 458 F.3d 359 (4th Cir. 2006). Although that subsection of § 502(a) is not involved here, the *LaRue* case nevertheless will likely entail study and reassessment of some or all of the same Supreme Court decisions that have affected the result here.

Consideration of this case in tandem with *LaRue* would permit this Court to undertake a comprehensive critique of the law concerning ERISA § 502(a) as it has thus far unfolded, and provide a broader and more informed basis for construing the scope of available ERISA remedies.

IV. THE VIEWS OF THE UNITED STATES SOLICITOR GENERAL SHOULD BE CONSULTED.

The concerns of the Secretary of Labor about restraints on the employment of ERISA generally are well known to this Court through amicus briefs submitted in various cases by the Solicitor General, including the pending *LaRue* case. From the Secretary's manifest dissatisfaction with what has come to be seen as a cramped interpretation of ERISA § 502(a)(3) in particular, there is excellent reason to suppose that the Solicitor General would enthusiastically respond if invited to comment in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and consideration should be given to consolidating this case with *LaRue*.

Respectfully submitted,

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Dated: August 29, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No.: 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on Behalf of all Others Similarly Situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS,

Appellants

v.

AT&T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10.

Appendix A

Submitted Under Third Circuit
LAR 34.1(a) March 27, 2007

(Filed May 2, 2007)

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587
District Judge: Honorable Stanley R. Chesler

Submitted Under Third Circuit LAR 34.1(a)
March 27, 2007

Before: FISHER, JORDAN and ROTH, *Circuit Judges.*

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

This case is before us for the second time on appeal. In the previous appeal, *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert. denied*, 534 U.S. 1014, 122 S.Ct. 506, 151 L.Ed.2d 415 (2001), we held that the plaintiffs had presented sufficient evidence of the defendants' specific intent to interfere with their pension rights to survive summary judgment on their claims under § 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. *Id.* at 150. We reversed the District Court's order granting summary judgment to the defendants and remanded for further proceedings. *Id.* After nearly three years of additional proceedings on remand, the District Court again granted summary judgment to the defendants, holding that the relief

the plaintiffs sought was not available to them. The plaintiffs appeal from that order and challenge several of the District Court's interlocutory orders. We will affirm.

I

We have previously set forth the basic facts in this litigation, *Eichorn*, 248 F.3d at 136-37, and we recite only the facts relevant to the present decision.

A

The plaintiffs are former employees of Paradyne Corporation ("Paradyne"). In 1995, Paradyne was part of AT&T Corp. ("AT&T"). AT&T reorganized that year, splitting into three parts: AT&T, Lucent Technologies, Inc. ("Lucent"), and NCR Corporation. In the course of the reorganization, AT&T transferred Paradyne to Lucent. In 1996, Lucent sold Paradyne to a business called Texas Pacific Group ("Texas Pacific"). Before that sale, the plaintiffs in this case had pension plans that included certain "bridging rights." If an employee left Lucent or another of the former AT&T companies and returned within six months, either to the company the employee had left or to another of the former AT&T companies, the employee could "bridge" the two terms of employment, receive pension credit for all prior service, and continue to accrue pension benefits as if he had never left. If the employee left and did not return until after the six-month "bridging period" had expired, the employee would need to work for an additional five years to regain his previous level of pension benefits.

Appendix A

The alleged basis for the plaintiffs' ERISA claims is that the defendants entered into agreements as part of the sale of Paradyne that had the effect of canceling the plaintiffs' bridging rights. In 1995, when Paradyne was part of AT&T, AT&T announced its intent to sell Paradyne. Recognizing the value of Paradyne's work force, and wanting to make Paradyne more attractive to potential buyers, AT&T announced a policy precluding any employee who voluntarily left Paradyne from being hired by any other division of AT&T. On June 18, 1996, Lucent and Texas Pacific signed a purchase agreement for the sale of Paradyne, and on July 31, 1996, the sale closed. The June 18 purchase agreement included a provision-referred to in this litigation as the "Pre Closing Net"—whereby Lucent promised that neither it nor any of the other former AT&T companies would hire any Paradyne employees who left Paradyne voluntarily before the sale closed and whose annual salaries were more than $50,000. On the date of the closing, Lucent signed an "employee matters agreement," which included a paragraph-referred to in this litigation as the "Post Closing Net"—extending the provisions of the Pre Closing Net for 245 days (eight months) after the closing.

Once the sale closed, the Paradyne employees' employment with Lucent terminated, and the "bridging period" began. Because the no-hire agreement embodied in the Pre Closing Net and Post Closing Net lasted for eight months, the Paradyne employees who made more than

$50,000 annually were prevented from exercising their bridging rights.[1]

B

Near the time of the Paradyne sale, Kurt Eichorn and Gilbert Daley filed substantially identical class action complaints in the United States District Court for the District of New Jersey, naming AT&T, Lucent, and Texas Pacific as defendants, and asserting, inter alia, that the Pre Closing Net and Post Closing Net violated § 510 of ERISA. The actions were consolidated and, after discovery, the District Court granted the defendants' motion for summary judgment, holding that the plaintiffs had not put forth sufficient evidence to create a triable issue of fact as to whether the defendants had the required intent to interfere with the plaintiffs' bridging rights. *Eichorn v. AT&T Corp.*, No. 96-3587, 1999 WL 33471890, at **2-6 (D.N.J. Aug. 23, 1999). On appeal, this court reversed and remanded that holding because we determined that the plaintiffs had presented sufficient circumstantial evidence to create a genuine issue of material fact regarding the defendants' intent. *Eichorn*, 248 F.3d at 149-50. The panel also directed the District Court on remand to address the plaintiffs' motions for additional discovery and for class certification. *Id.* at 150.

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1. Of the 29 plaintiffs in this case, 3 eventually returned to Lucent, and all 3 remained there long enough to bridge their pension rights, though they note they were "damaged by loss of pension-created service during the time corresponding to their period of separation."

Appendix A

C

On remand, the District Court reopened discovery and allowed the plaintiffs to file a motion for class certification. The parties appear to have proceeded after remand on the assumption that the plaintiffs would be entitled to some form of compensatory damages if they succeeded in proving their ERISA claims. On May 27, 2003, over three months after the close of reopened discovery and some seven years from the start of the case, the plaintiffs submitted spreadsheets to the District Court, offering their damage calculations for the first time. The spreadsheets were prepared by plaintiffs' counsel's son, Stephen Crowley, who was not offered as an expert and has no training or experience with the economics of employment benefits.

Mr. Crowley's calculations purported to quantify what each plaintiff would have earned in pension benefits, had he or she remained employed at an AT&T company after the sale of Paradyne. In performing the calculations, Mr. Crowley made various assumptions about such future events as when the plaintiffs would have retired, how their salaries would have increased had Paradyne remained part of Lucent, what choices the plaintiffs would have made with respect to their pension benefits, and what each plaintiff's life expectancy was. With his calculations, Mr. Crowley submitted a life expectancy chart from the "Foundation for Infinite Survival" and various statistical tables from the United States Department of Labor which, he asserted, provided part of the basis for his calculations.

Appendix A

The District Court accepted the plaintiffs' belated submissions and reopened discovery again to allow the defendants to depose Mr. Crowley. After deposing Mr. Crowley, the defendants made a motion to strike his calculations and to preclude him from testifying at trial. The plaintiffs opposed the motion and argued that, if the District Court were to grant the defendants' motion, the plaintiffs should be allowed to engage a damages expert. On November 10, 2004, the District Court granted the defendants' motion and denied as untimely the plaintiffs' request for leave to engage an expert.

In the course of making his initial ruling from the bench, which was later reduced to a written order, the District Judge explained that he did not believe his order would effectively end the case for the plaintiffs, because the plaintiffs might still be entitled to seek back pay and would not need the assistance of an expert to establish their entitlement to that relief. The Judge said,

> at a minimum, it would appear that a back pay case can in some manner or other go to the jury. Indeed, in this type of ERISA claim, a back pay claim is normally one of the court claims which go. In short, the theory of the case is that the plaintiffs were precluded from employment because of and based upon a desire to deny them . . . rights which they have under ERISA. . . .
>
> And therefore, in the Court's view, what could and would go to the jury would indeed be claims predicated upon the denial of their employment and potential back pay claims.

Further, the District Judge noted that the plaintiffs sought injunctive relief, and the Judge agreed that there was "at least a possibility" that such relief was available. Even so, he did not definitively rule on the issue, and the written order stated that "the Court does not reach the issue whether plaintiffs can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiff[s'] pension benefits and reserves such issue for resolution at or before trial." After he granted the defendants'*649 motion to strike Mr. Crowley's testimony and evidence, the District Court ordered the parties to confer with a magistrate judge "to schedule limited discovery of remaining damages issues and preparation of a final pretrial order."

After the reopened discovery closed, the defendants moved for summary judgment. They argued that the only relief available to the plaintiffs on their claim under ERISA § 510 for unlawful interference with benefits is the "appropriate equitable relief" available through § 502(a)(3) of the statute. Summary judgment was appropriate, they argued, because the only relief that the plaintiffs had requested or could request-given the District Court's order striking Stephen Crowley's submissions and denying the plaintiffs leave to find an expert to replace him-was "back pay," which is not "equitable relief" under § 502(a)(3). The District Court agreed with that analysis and, accordingly, granted summary judgment to the defendants. The plaintiffs now appeal, challenging the summary judgment order, the order that struck Stephen Crowley's submissions and denied

leave to retain an expert, and certain other interlocutory orders.[2]

II

The plaintiffs argue that the District Court erred both in ruling that Mr. Crowley's proposed evidence was inadmissible and in denying them leave to present an expert in lieu of Mr. Crowley. More specifically, though the plaintiffs concede that Mr. Crowley was not qualified as an expert, they argue that no special qualifications were necessary to testify regarding future damages in this case and that Mr. Crowley's testimony and spreadsheets were admissible under Federal Rule of Evidence 1006 as summaries of the contents of the statistical tables he submitted. The plaintiffs also argue that the District Court's order denying them leave to retain an expert witness after Mr. Crowley was excluded was an abuse of discretion. Those arguments are without merit.

---

2. The plaintiffs challenge the District Court's order of October 23, 2003, denying the plaintiffs' motion for class certification, and its orders of April 16, 2003, and July 19, 2005, denying the plaintiffs' motions to compel discovery of certain matters. We have considered the arguments of the parties with respect to the District Court's order of April 16, 2003. We are satisfied that the District Court correctly interpreted the mandate of this court with respect to the scope of the § 510 claims as to which the plaintiffs had presented enough evidence to survive a motion for summary judgment, and that the District Court did not otherwise abuse its discretion in denying the plaintiffs' motion to compel. The plaintiffs' challenges to the District Court's orders of October 23, 2003, and July 19, 2005, are moot in light of our disposition of this case.

Appendix A

A

In excluding Mr. Crowley's evidence, the District Court was within the broad discretion afforded it under Federal Rules of Evidence 701 and 702 to act as a gatekeeper charged with preventing unreliable opinion testimony. Although this court has recognized that lay opinion as to technical matters may sometimes be appropriate, *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1200-01 (3d Cir.1995), we have cautioned that "Rule 701 requires that a lay opinion witness have a reasonable basis grounded either in *experience or specialized knowledge* for arriving at the opinion that he or she expresses.... In order to satisfy these disposition of this case. Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered. *Id.* at 1201 (original emphasis). Whether a witness is "qualified" to offer opinion testimony is committed to the discretion of the trial court, and we have no difficulty holding that the District Court was within its discretion in saying that Mr. Crowley was not qualified to offer a damages opinion here. As the plaintiffs concede, Mr. Crowley had no personal knowledge of the underlying facts and no relevant experience or training.[3]

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3. The plaintiffs correctly note that expert testimony is not always required to prove damages in cases where projected future earnings are part of the calculation. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175-76 (3d Cir.1993); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 797 (3d Cir.1985). Here, however, the calculations were sufficiently complex that the District Court was

(Cont'd)

We also reject the plaintiffs' argument that Mr. Crowley's submissions were admissible under Rule 1006. That Rule provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Courts have cautioned that Rule 1006 is "not a back-door vehicle for the introduction of evidence which is otherwise inadmissible," and that the voluminous evidence that is the subject of the summary must be independently admissible. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir.2004); *see also United States v. Pelullo*, 964 F.2d 193, 204-05 (3d Cir.1992). The plaintiffs' proffered calculations are better described as a synthesis rather than a summary of the charts and other evidence on which Mr. Crowley relied. The calculations went beyond the data they summarized and included several assumptions, inferences, and projections about future events, which represent Mr. Crowley's opinion, rather than the underlying information. The proposed evidence is thus subject to the rules governing opinion testimony and was properly held inadmissible. *See* Fed.R.Evid. 701, 702; *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 258 (6th Cir.1986) (proposed exhibit was improperly

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(Cont'd)
within its discretion to hold that someone more qualified than plaintiffs' counsel's son was needed to testify. *Cf. LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928-29 (10th Cir.2004) ("Given Mr. Livingston's utter lack of any familiarity, knowledge, or experience with damages analysis, the district court did not abuse its discretion in ruling that he could not testify as an expert regarding such a complex subject matter as LifeWise's fourth damages model.").

admitted because, despite being labeled "Summary of Actual Damages," it "projected future events and economic losses, and was therefore not a simple compilation of voluminous records."); *State Office Sys., Inc. v. Olivetti Corp.*, 762 F.2d 843, 845-46 (10th Cir.1985) (projections of future lost profits set forth in a summary "are not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events, not a simple compilation of voluminous records.").

B

In denying the plaintiffs leave to engage an expert to replace Mr. Crowley, the District Court was within its power under Rule 16(b) of the Federal Rules of Civil Procedure to make and enforce scheduling orders. Rule 16 gives the district courts wide latitude to manage discovery and other pretrial matters, and to set deadlines for amending pleadings, filing motions, and completing discovery. Subsection (b) provides that scheduling orders "shall not be modified except upon a showing of good cause and by leave of the district judge." This Court and others have frequently upheld a trial court's exercise of discretion to deny a party's motion to add experts or other fact witnesses after the close of discovery or after a deadline in a scheduling order. *E.g., Burks v. Okla. Publ'g Co.*, 81 F.3d 975, 978-80 (10th Cir.1996); *Geiserman v. MacDonald*, 893 F.2d 787, 790-91 (5th Cir.1990); *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir.1986).

In this case, the reopened discovery on remand closed in January of 2003. As the defendants note, the plaintiffs were obligated under Federal Rule of Civil Procedure

26(a)(1)(C) to disclose early in the case, at or within 14 days after the discovery planning conference required by Rule 26(f), "a computation of any category of damages claimed" and "the documents or other evidentiary material, not privileged or protected from disclosure, on which such [damage] computation is based. . . ." The plaintiffs did not submit that information until May 2003, several months after the reopened discovery had closed, and nearly seven years into this litigation. Although the District Court pressed plaintiffs' counsel about plaintiffs' plan to proceed without expert testimony on the issue of damages, and although the Court told plaintiffs' counsel that "defendants have to know what claims a plaintiff is going to pursue in terms of damages in order to be able to prepare for it," the plaintiffs insisted that no expert testimony was necessary. The District Court then reopened discovery again to allow the defendants to depose Mr. Crowley. The plaintiffs did not request leave to present a damages expert until after the defendants filed their motion to exclude Mr. Crowley. The District Court considered the plaintiffs' explanation for the lateness of their request, the prejudice that would result if it were granted or denied, and the extent to which the plaintiffs' decision to proceed without expert testimony was a deliberate one. Under the circumstances, the District Court was well within its discretion to deny the plaintiffs' motion.

III

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful for an employer to act against an employee "for the purpose of interfering with the attainment of any right to which such participant might become entitled" under a

benefit plan. Section 510 concludes with the statement that "[t]he provisions of section 1132 [i.e., ERISA § 502] of this title shall be applicable in the enforcement of this section." The Supreme Court has held that the remedies available for a violation of § 510 are thus limited to those set forth in § 502(a) of ERISA, 29 U.S.C. § 1132. *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 144, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *see also Cox v. Keystone Carbon Co.,* 861 F.2d 390, 392 (3d Cir.1988) (explicitly rejecting the argument that "once Congress created a right pursuant to § 510, Congress was without power to restrict the remedies available . . . [and] it is entirely up to the court to fashion appropriate remedies. . . .").

Though the parties dispute the scope and application of subsections (a)(1)(B) and (a)(3), they do not suggest that any other portions of ERISA § 502 apply to this case.

A

The District Court held that the plaintiffs could not seek relief under ERISA § 502(a)(1)(B) because that section only provides relief for violations of the terms of a benefit plan, and the plaintiffs have not alleged such a violation. We agree.

Appendix A

1

Subsection (a)(1)(B) provides that "[a] civil action may be brought by a participant or beneficiary . . . to recover benefits due to him *under the terms of his plan,* to enforce his rights *under the terms of the plan,* or to clarify his rights to future benefits *under the terms of the plan.*" 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The subsection thus provides a cause of action only where a plaintiff alleges a violation of the terms of a benefits plan or an ambiguity in the plan requiring judicial interpretation. In holding that subsection (a)(1)(B) is not an appropriate vehicle for enforcing a claim of interference with the benefits of a plan, which is the gravamen of the claim here, the Seventh Circuit explained:

> [T]o enforce the terms of a plan under Section 502, the participant must first qualify for the benefits provided in that plan. Rather than concerning itself with these qualifications, one of the actions which Section 510 makes unlawful is the interference with a participant's ability to meet these qualifications in the first instance.

Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir.1992) (citation omitted). This appears to be the view of the few courts that have squarely confronted the issue. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir.1999) (citing *Tolle*); *Russell v. Northrop Grumman Corp.*, 921 F.Supp. 143, 150 (E.D.N.Y.1996) (citing *Tolle*). Other courts have implicitly taken this view by indicating in dicta that § 502(a)(3) is the provision available for enforcing a §

510 interference claim. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1247 (10th Cir.2004) ("Section 502(a)(3) of ERISA provides the plan participant with his exclusive remedies for a § 510 violation."); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir.1993) (quoting § 502(a)(3) as the enforcement mechanism for rights under § 510); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir.1993) (Section 510, "enforced through § 1132(a)(3) [i.e., § 502(a)(3)], provides a companion to § 1132(a)(1), which provides actions to recover benefits or clarify rights."); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir.1990) ("If discharging [the plaintiff] was 'unlawful' under § 1140 [i.e., § 510], plaintiff was entitled to bring (and did bring) an action for declaratory and injunctive relief under 29 U.S.C. § 1132, which authorizes [the relief set forth in ERISA § 502(a)(3)]."); [4] *cf.* Dana M. Muir, *ERISA Remedies:*

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4. In *Held*, the plaintiff alleged that the defendants violated ERISA § 510 by coercing him to resign shortly before he had completed the ten years of service necessary for certain of his pension rights to vest. 912 F.2d at 1198. Although the majority in *Held* stated that the plaintiff had "two distinct causes of action," one of which was a claim under § 502(a)(1)(B) for "benefits due under the plan," *id.* at 1203-04, it is clear from both the majority's and the dissenting judge's discussion that the cause of action under § 502(a)(1)(B) was not to enforce rights under § 510, but was instead based on the plaintiff's allegation that he had actually accrued some pension rights that the defendants had failed to honor. *See id.* at 1203 n. 7 (reading the complaint as potentially raising a "colorable claim to something less than '100% of accrued benefits' based on his employment of more than nine years"); *id.* at 1203-04 ("Admittedly, the parties' briefs emphasize Mr. Held's § 510 claim and give short shrift to the issue of Mr. Held's *separate claim* for benefits due under the plan.")

(Cont'd)

Chimera or Congressional Compromise?, 81 Iowa L.Rev. 1, 39 & nn. 321-22 (1995) ("Many commentators and courts agree that Section 502(a)(3) . . . provides the sole basis for suits alleging a violation of Section 510."). Decisions from at least one court appear to take the opposite view. *See Zimmerman v. Sloss Equip., Inc.*, 835 F.Supp. 1283, 1290 (D.Kan.1993) ("The remedies for a violation of ERISA § 510 are those set forth in ERISA § 502(a)(1)(B) and (a)(3)."); *Babich v. Unisys Corp.*, No. 92-1473, 1994 WL 167984, at *3 (D.Kan.1994) ("the damages available to an ERISA § 510 plaintiff are found in ERISA's enforcement provision, § 502(a)(1)(B) and (a)(3)."") (citing *Zimmerman* and *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 392-94 (3d Cir.1988)).[5]

We agree with the Seventh Circuit's reasoning in *Tolle*, which follows from a straightforward reading of the statute. Subsection (a)(1)(B) provides remedies only against a defendant who has failed to comply with the terms of a benefits plan. It allows plaintiffs to collect benefits "due

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(emphasis added); *id.* at 1207 (Ebel, J., dissenting) (disagreeing with "the majority's view that the plaintiff has filed a separate claim for benefits due him under the terms of the retirement plan" because, as he read the record, "it is clear that plaintiff's request for benefits is linked only to his discriminatory termination claim under section 510 of ERISA.").

5. As we will explain, *infra* § III.A.2, our decision in *Cox v. Keystone Carbon*, 861 F.2d 390 (3d Cir.1988) does not hold that § 502(a)(1)(B) provides relief for a claim under § 510 for interference with benefits.

under the terms of the plan" or to enforce "rights under the terms of the plan." Here, the plaintiffs have alleged that the defendants interfered with their ability to become eligible for further benefits, not that the defendants have breached the terms of the plan itself. We therefore agree with the District Court that subsection (a)(1)(B) does not provide relief for the violation of ERISA that the plaintiffs have alleged, and, accordingly, summary judgment on the issue was proper.

2

The plaintiffs argue that this Court's decisions in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir.1988) ("*Cox I*") and *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir.1990) (" *Cox II* "), and the Tenth Circuit's decision in *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir.1998), support a different result. In this they are mistaken.

The plaintiffs' principal argument appears to be that, although they have not alleged that the defendants violated the terms of the benefits plan, the District Court could nevertheless effectively create a violation of the plan through a decree ordering Lucent to adjust its pension records to treat the plaintiffs as if they had remained at Lucent until retirement. The plaintiffs contend that such an order would result in an immediate obligation on the part of the defendants to pay the plaintiffs money that was rendered "past due" by operation of the court's decree, thus entitling the plaintiffs to seek relief under subsection (a)(1)(B). This bootstrap approach finds no support in the decisions the plaintiffs cite.

The Tenth Circuit's opinion in *Adams* is inapposite, as the plaintiffs in that case alleged violations of the terms of a plan rather than interference with the attainment of benefits. The court in *Adams* was not asked to construct a violation of an order and then treat that violation as if it were a violation of the terms of a benefit plan. The court was simply asked to construe the terms of the plan itself to determine whether the plaintiffs were eligible for the benefits they sought. 149 F.3d at 1158-62. Unlike the plaintiffs in this case, the plaintiffs in *Adams* alleged a violation of the terms of their former employer's plan and were thus clearly entitled to seek relief under ERISA § 502(a)(1)(B). Here, by contrast, the plaintiffs have alleged that the defendants interfered with their ability to become eligible for benefits, which, as the Seventh Circuit explained in *Tolle*, is not a proper basis for relief under § 502(a)(1)(B).

Although *Cox I* and *Cox II* involved claims under ERISA § 510, they are also unavailing as support for the plaintiffs' argument. In *Cox I*, this Court indicated in dictum that § 510 could be enforced through § 502(a)(1)(B) when an interference-with-benefits claim is alleged. 861 F.2d at 392-93. However, that appears to have been a proposition assumed by the parties and accepted by us without analysis or discussion. Moreover, we expressly declined to decide whether § 502(a)(1)(B) provided any relief to the plaintiff in that case. *Id.* at 394. Instead, we remanded for the district court to determine in the first instance "if Cox is entitled to relief pursuant to § 502(a)(1)(B), and if so, whether or not Cox is entitled to a jury trial on this claim." *Id.*

On remand, the district court held that Cox had stated a § 510 claim enforceable under § 502(a)(1)(B), but that he was not entitled to a jury trial and that he lost on the merits of that claim. Cox appealed, and we affirmed in *Cox II.* As in *Cox I,* the primary focus of our discussion was whether Cox was entitled to a jury trial. 894 F.2d at 649-50. We did not undertake any analysis of whether the district court had correctly held that a claim under § 510 could be enforced under § 502(a)(1)(B). The only comment we made that appears directly relevant to this issue undermines, rather than supports the plaintiffs' position in this case. In disposing of Cox's arguments, we stated, "[t]o the extent that Cox seeks compensatory damages for tortious interference, that claim does not fall within section 502(a)(1)(B)." 894 F.2d at 650. Our decisions in *Cox I* and *Cox II* thus do not conflict with the Seventh Circuit's reasoning in *Tolle,* nor do they prevent us from adopting that reasoning in this case, as the District Court did. Because we find that reasoning persuasive, we hold that a § 510 claim for interference with benefits is not enforceable under § 502(a)(1)(B).

B

The District Court held that the plaintiffs were not entitled to "appropriate equitable relief" under ERISA § 502(a)(3) because they had waived their right to request equitable restitution or injunctive relief. Alternatively, the District Court ruled that, even if the plaintiffs had not waived any of their rights with respect to a remedy, the relief they requested was not "appropriate equitable relief" within the meaning of the statute. We agree on the latter point and, therefore, do not reach the question of waiver.

Appendix A

1

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought—
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> (B) to obtain *other appropriate equitable relief*
>
> (i) to redress such violations or
>
> (ii) to enforce any provisions of this subchapter or the terms of the plan;

(emphasis added). The Supreme Court has held that the phrase "appropriate equitable relief" means only "those categories of relief that were *typically* available in equity" in the days of the divided bench, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (original emphasis)). According to the Supreme Court, such relief includes "injunction, mandamus, and restitution, but not compensatory damages." *Mertens*, 508 U.S. at 256, 113

S.Ct. 2063. Thus, a plaintiff seeking relief under ERISA § 502(a)(3) must tie that request to a form of relief typically available in equity. In *Great-West,* the Court suggested that "the basic contours of the term [equitable relief] are well known," and can be understood by consulting "standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." 534 U.S. at 217, 122 S.Ct. 708; *see also Sereboff v. Mid Atl. Med. Servs., Inc.*, __ U.S. __, 126 S.Ct. 1869, 1875-76, 164 L.Ed.2d 612 (2006) (referring to Dobbs, Palmer, and *Pomeroy's Equity Jurisprudence* to explain the contours of the right to an equitable lien).

As earlier noted, the plaintiffs sought a decree from the District Court requiring Lucent to adjust its pension records retroactively to create an obligation to pay the plaintiffs more money, both in the past and going forward. The District Court rightly saw this as being, in essence, a request for compensatory damages merely framed as an "equitable" injunction. The Court thus rightly concluded that the requested relief is not available under § 502(a)(3).[6]

6. This is not to say that an ERISA plaintiff's demand for money necessarily requires the conclusion that the relief sought is not "equitable" within the meaning of the statute. The Supreme Court has explained that some forms of equitable relief-such as constructive trusts, equitable liens, or accounting for the profits derived from wrongly held property-include the payment of money. *Great-West,* 534 U.S. at 213-14 & n. 2, 122 S.Ct. 708. As the Court explained in *Great-West,* however, these forms of relief are available in limited circumstances. "Almost invariably, suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as

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Great-West, 534 U.S. at 210, 122 S.Ct. 708; *Mertens*, 508 U.S. at 255, 113 S.Ct. 2063 (1993); *see also Bowen v. Massachusetts*, 487 U.S. 879, 915-16, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (Scalia, J., dissenting) ("It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.").

2

The plaintiffs argue that the relief they seek is indistinguishable from the relief approved by the Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), and, therefore, *Varity* and this Court's decisions in *Cox I* and *Cox II*, as well as the Tenth Circuit's decision in *Adams*, compel a different result. Once again, we disagree.

In *Varity*, the defendant corporation deceived several of its employees into transferring their jobs and their benefit plans from a profitable subsidiary to another subsidiary that had been set up to fail. *Id.* at 493-94, 116 S.Ct. 1065. The trial court found that the defendant had violated its obligation as a fiduciary to operate its benefits plan "solely in the interest

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that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Id.* at 210, 122 S.Ct. 708 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (Scalia, J., dissenting)).

of the participants and beneficiaries" of the plan, and issued an order—citing ERISA § 502(a)(3) as its source of authority-directing the corporation to reinstate the transferred employees back into the benefits plan of the profitable subsidiary. *Id.* at 494-95, 116 S.Ct. 1065. *Varity* is distinguishable from the present case for at least two reasons.

First, the plaintiffs in *Varity* were deceived into transferring from one subsidiary to another within the same company, and thus the relief in that case was measurable according to the defendants' gain, rather than the plaintiffs' loss. *LaRue v. DeWolff, Boberg & Assocs.*, 450 F.3d 570, 576 (4th Cir.2006) (holding that a plaintiff could not recover under ERISA § 502(a)(3) where he alleged that he lost money because his 401(k) plan administrator had failed to follow his directions for making changes to his investment, noting that the plaintiff "gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss-a measure that is traditionally legal, not equitable"); *Millsap*, 368 F.3d at 1253 (holding, in a § 510 case involving a plant closing, that back pay was not "appropriate equitable relief" because it measured the plaintiffs' loss rather than the defendants' gain). In *Varity*, the plaintiffs sought pension benefits for work they had actually done for their employer, and the court's decree was a matter of restoring the plaintiffs' benefits enrollment to the preexisting arrangement, thus undoing the effects of the defendants' deception. Here, however, the plaintiffs are seeking pension benefits for work they never did for AT&T or its former divisions, but which they argue they might have done had AT&T not adopted a hiring policy that they claim violated ERISA. The remedy they seek is thus akin to "back pay," which is not an equitable

remedy within the meaning of the statute. *Great-West,* 534 U.S. at 218 n. 4, 122 S.Ct. 708; *see also Millsap,* 368 F.3d at 1253 ("[P]aying backpay damages is like paying an extra worker who never came to work." (quoting *Ford Motor Co. v. EEOC,* 458 U.S. 219, 229, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982))); *id.* at 1254 ("Plaintiffs' proposed method of calculating their backpay award is based on each individual class member's loss rather than Defendant's gain . . . [and] is thus in the nature of compensatory damages."); 2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) at 226 (2d ed.1993) ("Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due, for example . . . [s]o, while reinstatement is clearly equitable as a form of injunctive relief, back pay seems to be just as clearly legal.") (footnotes omitted).

Second, the Court in *Varity* did not rule on the question of whether the relief sought was "equitable" within the meaning of the statute, because the defendants stipulated that it was. 516 U.S. at 508, 116 S.Ct. 1065 ("Varity *concedes* that the plaintiffs satisfy most of this provision's requirements, namely, that the plaintiffs are plan 'participants' or 'beneficiaries,' *and that they are suing for 'equitable' relief to 'redress' a violation of § 404(a),* which is a 'provision of this title.' " (emphasis added)); *see also Great-West,* 534 U.S. at 221 n. 5, 122 S.Ct. 708 ("In *Varity* . . . it was undisputed that the respondents were seeking equitable relief . . ." (emphasis omitted)).

Cox I and *Cox II* are also unavailing as support for the plaintiffs' position. It is true that those decisions addressed whether there is a right to a jury trial in actions under ERISA

§ 502(a)(1)(B), and that ultimately we decided there is not, because such actions are analogous to actions for breach of trust, which were typically heard in courts of equity. *See Cox II,* 894 F.2d at 649 (citing *Turner v. CF & I Steel Corp.*, 770 F.2d 43 (3d Cir.1985)). It does not follow, however, that all relief available for a breach of trust at common law is "equitable relief" within the meaning of § 502(a)(3) of ERISA. The Supreme Court explicitly rejected that argument in *Mertens,* 508 U.S. at 258, 113 S.Ct. 2063 (holding that the term "equitable relief" in § 502(a)(3) does not mean "all relief available for breach of trust at common law").

Neither does *Adams* require a result contrary to our decision here. In the context of determining whether the plaintiffs in that case were entitled to a jury trial on their claims, the Tenth Circuit explained that the recovery of benefits due under the terms of a plan is analogous to equitable restitution. 149 F.3d at 1162. As discussed above, however, the plaintiffs are not seeking benefits that were wrongly withheld for work they performed for the defendants. Rather, they are seeking an award of benefits as an approximation of the loss they suffered as a result of what they say is the defendants' violation of § 510 of ERISA. As the Supreme Court explained in *Great-West,* this amounts to a claim for *legal* damages, not *equitable* restitution, and thus is relief not available to the plaintiffs in this case. 534 U.S. at 213-14, 122 S.Ct. 708 (explaining the difference between legal and equitable relief); *Skretvedt v. E.I. DuPont De Nemours,* 372 F.3d 193, 210-12 (3d Cir.2004) (same).

We therefore agree with the District Court that the relief the plaintiffs sought is not "equitable" within the meaning of ERISA § 502(a)(3).

C

Finally, the plaintiffs argue that the District Court's grant of summary judgment is contrary to the mandate of this Court, and that its reading of § 502 would render § 510 of ERISA without effect. Both of those arguments are without merit.

A district court must "implement both the letter and spirit of the mandate" it receives from this Court, but district courts are free to "consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949-50 (3d Cir.1985) (citing cases). We held in the previous appeal that the plaintiffs had presented sufficient evidence to survive a summary judgment motion that argued the defendants lacked any intent to interfere with the plaintiffs' pension benefits. We neither explicitly nor implicitly ruled on the question of whether any of the relief the plaintiffs sought was available under § 502, and that issue was therefore open for the District Court to address on remand.

The plaintiffs argue, however, that the defendants' failure to raise the issue of whether § 502 afforded the plaintiffs any relief resulted in a waiver of that issue. For that proposition, they rely on our decision in *Skretvedt*. In *Skretvedt*, the plaintiff filed an eight-count complaint, the District Court granted summary judgment to the defendants on all eight counts, and the plaintiff only appealed as to two of the eight counts. 372 F.3d at 197-99. The plaintiff won a remand on appeal and then sought to relitigate on remand some of the remaining six counts for which he had not

secured a remand. *Id.* at 199. We held that the plaintiff had waived any right to recover on those claims by not challenging the District Court's grant of summary judgment on those claims in the first appeal. The panel stated that "[w]e have consistently rejected such attempts to litigate on remand issues that were not raised *in a party's prior appeal* and that were not explicitly or implicitly remanded for further proceedings." *Id.* at 203 (emphasis added); *see also Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 88 (3d Cir.1987) ("An issue that is not addressed in *an appellant's brief* is deemed waived on appeal.") (emphasis added).

Here, however, the defendants were the *appellees* in the previous appeal. As such, they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds. *See Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir.2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals."); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C.Cir.1995) ("[F]ull application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal, [and t]hat dilemma, together with the potential judicial *dis*economies of forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.") (original emphasis).

We also reject the plaintiffs' argument that the District Court's construction of § 502(a) renders § 510 ineffective. As the Supreme Court has noted, the "prototypical" claim under § 510 of ERISA is when an employer terminates an employee to prevent his pension rights from vesting. *Ingersoll-Rand,* 498 U.S. at 143, 111 S.Ct. 478. Under such circumstances, the typical remedy is reinstatement, which is an equitable remedy within the terms of the statute. 2 Dobbs § 6.10(5) at 226. It may be that § 502(a) restricts the scope of § 510 as a practical matter by leaving without remedy some violations of § 510 that differ from the "prototypical" case. That the plaintiffs are without a remedy in this case, however, does not render § 510 ineffective in all cases, and thus does not implicate the canon of statutory interpretation that cautions against interpreting a statute so as to render one part inoperative. *See generally United States v. Menasche,* 348 U.S. 528, 538, 75 S.Ct. 513, 99 L.Ed. 615 (1955).

IV

For the foregoing reasons, we will affirm the judgment of the District Court.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on behalf of all others similarly situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS.

Appellants

v.

AT & T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10

Appendix B

On Appeal From the United States District Court
for the District of New Jersey,
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587)
District Judge: Honorable Stanley R. Chesler

Submitted Under Third Circuit LAR 34.1(a)
March 27, 2007

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on March 27, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED that the judgment of the District Court be and the same is hereby AFFIRMED, all of the above in accordance with the opinion of this Court.

Costs taxed against Appellants.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: May 2, 2007

Costs taxed in favor of Appellee, Texas Pacific Group as follows:

Brief	$123.26
TOTAL	$123.26

APPENDIX C — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 31, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-5461

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, Individually and on behalf of all others similarly situated; WILLIAM LAWLESS; RUSSELL LEPPALA; GABE P. TOROK; JUDITH B. BRUGNER; KATE HARRIS; CAROLE T. JOHNSON; CHARLES O. LAUGHLIN, II; MICHAEL A. MCFARLAND; BARBARA OLIVER; GARY PATTERSON; ROBERT PROUIX; WILLIAM J. SCHROTT; ROBERT MICHAEL SHEPHERD; RONALS A. SOKOL; JOSEPH T. SZLASA; DIANE F. TAYLOR; LORRAINE J. WELCH; MARIE ZEITS,

Appellants

v.

AT & T CORP.; LUCENT TECHNOLOGIES INC.; TEXAS PACIFIC GROUP; NCR CORPORATION; THE CIT GROUP, INC.; JOHN DOE CORPORATIONS 1-10.

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On Appeal From the United States District Court
for the District of New Jersey,
(D.C. Civil Nos. 96-cv-04674; 96-cv-03587)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
RENDELL, AMBRO, FUENTES, SMITH,
FISHER, CHAGARES, JORDAN and ROTH *,
Circuit Judges.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Ambro concurs in the decision to deny rehearing en banc and files a separate opinion attached hereto with respect to the decision to deny rehearing en banc.

BY THE COURT,

/s/ Kent A. Jordan
Circuit Judge

Dated: May 31, 2007

* As to panel rehearing only.

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AMBRO, *Circuit Judge*, concurring in denial of the petition for rehearing *en banc*.

I vote to deny rehearing *en banc* because I believe the panel decision correctly applies *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). As the panel concludes, the focus of those opinions-particularly *Mertens* and *Great-West*-is that any make-whole monetary relief that is not directly traceable to some wrongly held property is properly characterized as legal. not equitable, relief, and is thus unavailable in a 29 U.S.C. § 1132(a)(3) action. Slip. Op. at 24. Under this rubric, Eichorn's request for an adjustment of pension records that would create a payment obligation is clearly unavailable.

Though I agree with the panel's opinion, I write separately to urge Congress or the Supreme Court to revisit what Judge Becker called "an unjust and increasingly tangled ERISA regime." *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir.2003) (Becker, J., concurring). As Justice Ginsburg noted a few years ago,

> [b]ecause the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided."

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Aetna Health Inc. v. Davila, 542 U.S. 200, 222, 124 S.Ct. 2488, 159 L.Ed.2d 312 (quoting *DiFelice*, 346 F.3d at 456-57) (Ginsburg, J., concurring).

Nowhere is that more apparent than this case. We held in *Eichorn I* that the plaintiffs here have produced sufficient evidence that AT & T and Lucent intentionally interfered with their ERISA benefits to survive summary judgment. *Eichorn v. Am. Tel. & Tel. Corp. (Eichorn I)*, 248 F.3d 131, 150 (3d Cir.2001). Now, however, we are compelled to affirm the entry of summary judgment in the defendants' favor, not because of a failure of proof, but because ERISA-as the Supreme Court interprets it—does not provide a remedy. As the panel notes, plaintiffs asserting an interference claim can only seek injunctive relief or reinstatement;[1] they cannot seek make-whole monetary relief of any kind. Slip. Op. at 31. What makes this result odd is that the preferred remedy for the common law analog of this claim-interference with an expectancy—is money damages. *See* Restatement (Second) of Torts § 774B & cmt. e. Thus, to accept the *Mertens/ Great-West* formulation is to accept that Congress specifically allowed ERISA participants to pursue a cause of action for interference but, with no relevant comment in the legislative history, disallowed the most natural remedy. At risk of using another canine metaphor,[2] this result is odd enough that its

1. The panel also notes that in theory they could seek a constructive trust or equitable lien over identifiable wrongly held property, though it is most doubtful that those remedies would be appropriate in an interference claim. *See* Slip Op. at 24 n. 6.

2. I fear that our Court has had its fill of those after the *Grier* case. *See United States v. Grier*, 475 F.3d 556, 568 n.8. (3d Cir.2007) (en banc); *id.* at 579-87 (Ambro, J., concurring in judgment); *id.* at 598 (Sloviter, J., dissenting); *id.* at 616 (McKee, J., dissenting).

silent passage strikes me like "the curious incident of the dog in the night-time."[3] Moreover, as Professor John Langbein has argued, *Mertens* and *Great-West* employ a concept of "equitable relief" so narrow that it ignores the fact that chancery courts regularly awarded monetary make-whole relief in appropriate circumstances, particularly to trust beneficiaries. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. L.Rev. 1317, 1353-62 (2003).

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3. [Gregory:] "Is there any point to which you would wish to draw my attention?"

> [Sherlock Holmes:] "To the curious incident of the dog in the night-time." "The dog did nothing in the night-time."
>
> "That was the curious incident," remarked Sherlock Holmes.
>
> . . . .
>
> [Sherlock Holmes:] "Before deciding that question I had grasped the significance of the silence of the dog, for one true inference invariably suggests others. The Simpson incident had shown me that a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was someone whom the dog knew well."

ARTHUR CONAN DOYLE, *Silver Blaze, in* The Complete Sherlock Holmes 383, 400 (1938); *see also Chisom v. Roemer*, 501 U.S. 380, 396 n. 23, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

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This case demonstrates that the *Mertens/ Great-West* definition of "equitable relief" functionally prohibits many legitimate plaintiffs from seeking an ERISA remedy. As the panel opinion notes, it does not cut off all relief. Slip Op. at 31. Here, for example, the District Court could have enjoined AT & T and Lucent from enforcing the anti-"bridging" agreement. But by the time the case was ready for trial, the six-month window for rehiring AT & T/Lucent employees had long passed, rendering such an injunction worthless.

This result is not uncommon. Because of the complexity of much ERISA litigation (not to mention the shortage of federal judges), it tends to move slowly. The very predicate of an interference claim is that the defendant is keeping the plaintiff from benefits to which he would otherwise be entitled. *See* 29 U.S.C. § 1140. The longer that interference continues, the less likely it is that injunctive relief will provide a workable remedy. Even in the typical case-one in which an employee is fired to prevent benefits from vesting, *see* Slip Op. at 31-the propriety of reinstatement wanes over time as the employee ages and the nature of the employer's business changes. In these cases, time is on the defendant's side in an insidious way, for by drawing out the litigation it has a chance of mooting the entire suit. The end result is that for plaintiffs like Eichorn the case is won or lost at the preliminary injunction stage, for only that remedy will prevent the case becoming moot while discovery proceeds. This is both unfair and against the grain of our civil justice system, which couples notice pleading with liberal discovery rules to ensure that " 'the gravamen of the dispute [is] brought frankly into the open for the inspection of the court.' " *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct.

992, 152 L.Ed.2d 1 (2002) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1202 (2d ed.1990)). Here, accepting the opportunity for discovery (or merely responding to a motions-happy defendant) can render worthless the proof the plaintiff produces. It is hard to imagine that this narrow window of relief is the result Congress intended.

Judicial[4] and scholarly[5] concern could hardly be higher.

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4. *See, e.g., Lind v. Aetna Health, Inc.*, 466 F.3d 1195, 1200 (10th Cir.2006) (McConnell, J.) (noting that *Mertens* and *Great-West* produce "lopsided results"); *Pereira v. Farace*, 413 F.3d 330, 345-46 (2d Cir.2005) (Newman, J., concurring) (questioning the *Great-West* definition of equity); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1266 (10th Cir.2004) (Lucedo, J., dissenting) ("Here, reinstatement would have been an appropriate equitable remedy had McDonnell Douglas not so delayed proceedings as to make reinstatement impossible. Thus, through no fault of their own, the class plaintiffs find themselves devoid of the undeniably appropriate equitable remedy of reinstatement."); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d at 453 (Becker, J., concurring); *id.* at 468 (Ambro, J., concurring); *Cicio v. Does*, 321 F.3d 83, 107 (2d Cir.2003) (Calabresi, J., dissenting); *Van Natta v. Sara Lee Corp.*, 439 F.Supp.2d 911, 941 (N.D.Iowa 2006) (Bennett, C.J.); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 55-56 (D.Mass.1997) (Young, J.).

5. *See, e.g.*, Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable Relief" under ERISA Section 502(a)(3)*, 39 J. Marshall L.Rev. 827 (2006); Maria O'Brien Hylton, *Insecure Retirement Income, Wrongful Plan Administration, and Other Employee Benefit Woes-Evaluating ERISA at Age Thirty*, 53 Buff. L.Rev.. 1193 (2005) (reviewing James A Wooten, The Employee Retirement Income

(Cont'd)

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It is time for Congress or the Supreme Court to reconsider the interplay between the extent to which make-whole monetary relief is available under 29 U.S.C. § 1132(a)(3) and the preemption of state-law causes of action that could accord that relief.

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Security Act of 1974-A Political History (2004)); Lorraine Schmall & Nathan Ihnes, *Failure of Equity: Discriminatory Plan Closing as an Irreemediable Injury under ERISA*, 55 Cath. U.L.Rev. 81 (2005); Sarah Beth Spisich, *The Aftermath of* Davila: *Are Healthcare Enrolees Now a Sinking Ship Without a Paddle?*, Health Law. 22 (Aug.2005); James J. Budney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L.Rev.. 1, 79-81 (2005); Robert F. Rich, et al., *Judicial Interpretation of Managed Care Policy*, 13 Elder L.J. 85 (2005); Scott M. Aronson, *ERISA's Equitable Illusion: The Unjust Justice of Section 502(a)(3)*, 9 Employee Rts. & Empl. Pol'Y J. 247 (2005); Langbein, *supra*; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 256-72 (2003); John M. Teske, Note, *Damage Suits Under ERISA: Why Third Parties with Discretion over Benefit Plans Must Be Held Accountable*, 36 Loy. L.A. L.Rev.. 1753 (2003); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 Smu L.Rev. 1577 (2002); Daniel J.Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup.Ct. Rev. 343, 383-84 & n. 164; Lisa N. Bleed, Note, *Enforcing Subrogation Provisions as "Appropriate Equitable Relief" Under ERISA Section 502(a)(3)*, 35 U.S.F. L.Rev. 727 (2001); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. Pa. J. Lab. & Emp. L. . 391 (2000); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Health Benefits, False Employer Promises and the Protective Judiciary*, 9 DePaul Bus. L.J. 305 (1997); Karen A. Jordan, Travelers

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Insurance: *New Support for the Argument To Restrain ERISA Pre-emption*, 13 Yale J. on Reg. 255 (1996); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 Notre Dame L.Rev. 861, 894-96 (1996); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 Iowa L.Rev. 1 (1995); Susan J. Stabile, *Preemption of State Law by Federal Law: a Task for Congress or the Courts?*, 40 Vill. L. Rev. . 1, 33-35 (1995); Maria Linda Cattafesta, Note, *Mertens v. Hewitt Associates: Nonfiduciary Liability for Money Damages under ERISA*, 43 Cath. U.L.Rev. 1165 (1994); Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: an Abdication of Judicial Law-Creating Authority*, 46 Fla. L.Rev. 355 (1994); Robert A. Kamp, *The Argument for "Extra-Contractual" Damages under ERISA*, 82 Ill. B.J., 70 (1994); Richard Rouco, Note, *Available Remedies under ERISA Section 502(a)*, 45 Ala. L.Rev. 631 (1994); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U. L.Q., 671 (1994); Gregory A. Hewett, Note, *Should Non-Fiduciaries Who Knowingly Participate in a Breach of Fiduciary Duty Be Liable for Damages under ERISA?*, 71 Wash. U. L.Q., 773 (1993).

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 22, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler, U.S.D.J.

Civ. No. 96-3587

KURT H. EICHORN, et al.,

plaintiffs,

v.

AT&T CORP.; LUCENT TECHS. INC.; TEXAS PACIFIC GROUP; NCR CORP.; THE CIT GROUP, INC.; AND "JOHN DOE" CORPS. 1-10,

defendants.

OPINION

CHESLER, District Judge

This matter comes before the Court on a motion by the defendant Texas Pacific Group ("TPG"), pursuant to Rule 56, for summary judgment against the plaintiffs. [Docket Entry Nos. 173 & 174.] Defendants Lucent Technologies, Inc. ("Lucent"), AT&T Corporation ("AT&T"), and NCR Corporation ("NCR") join in TPG's motion. In this action, plaintiffs seek relief against the defendants under the

Employees Retirement Income Security Act ("ERISA") for allegedly foreclosing certain retirement benefits to which they were entitled. Plaintiffs invoke Section 510 of ERISA, 29 U.S.C. § 1140, through its remedial mechanisms, Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) and Section 502(a)(3), 29 U.S.C. § 1132(a)(3).[1] For the reasons set forth below, defendants' motion is granted.

I. FACTS

A. Factual Background

This case involves AT&T's sale of a subsidiary, Paradyne Corporation ("Paradyne"), and the effect of that sale on the retirement benefits of the plaintiffs, Paradyne employees.

In 1989, AT&T acquired Paradyne, a maker of telecommunications network access products, and operated it as a wholly-owned subsidiary. Paradyne's employees were covered by a pension plan established by AT&T and adopted by its affiliates (the "AT&T Plan"). (Final Pretrial Order ("FPO") at 8, ¶ 13.) Plaintiffs contend that the AT&T Plan allowed an employee who left one AT&T company and, within six months, was re-employed by another AT&T company, to receive credit for all prior service and, as a vested pension plan participant, to immediately begin to accrue additional pension benefits. (*Id.*) Plaintiffs further contend that if re-employment were to occur after a break in AT&T service of more than six months, the employee would have

1. The Court will refer to these provisions as Section 510, Section 502(a)(1)(B), and Section 502(a)(3), respectively.

to remain employed for an additional five years to bridge the two terms of employment for pension purposes. (*Id.*)

On October 18, 1995, AT&T announced its intent to sell Paradyne. (*Id.* at 6, ¶ 6.) Plaintiffs contend that, to make Paradyne more attractive to buyers, AT&T adopted a policy, known as the "Preliminary Net," that prohibited Paradyne employees from transferring to other jobs within the AT&T companies. (*Id.* at 6, ¶ 6.) Plaintiffs maintain that the reason for the hiring bar was AT&T's belief that one of Paradyne's most marketable assets was its skilled employees and retention of those employees was considered essential for the sale of Paradyne. (*Id.* at 8, ¶ 15-16.) Plaintiffs further contend that retaining Paradyne employees further served the defendants' interests of maintaining its viability as a supplier of telecommunications equipment to AT&T and its affiliates. (*Id.* at 7, ¶ 11-12.)

In November of 1995, AT&T reorganized, resulting in the creation of three separate companies: AT&T, Lucent, and NCR. (FPO at 5, ¶ 6.) This reorganization is known as the "AT&T Trivestiture." As part of the AT&T Trivestiture, AT&T transferred Paradyne to Lucent. (FPO at 5, ¶ 2.) Pursuant to the Preliminary Net, Paradyne employees remained precluded from seeking employment at other AT&T companies.

TPG became interested in acquiring Paradyne from Lucent and, in April of 1996, began negotiating its purchase. (*Id.* at 6, ¶ 3; 8, ¶ 14.) Negotiations culminated in the June 18, 1996 Purchase Agreement between TPG and Lucent. (*Id.* at 8, ¶ 14.) The Purchase Agreement included a further

hiring restriction that prohibited AT&T, Lucent, and their respective affiliates from hiring anyone who had been employed at Paradyne since June 1, 1996 and whose compensation was greater than $50,000. (*Id.* at 8, ¶ 16; Certification of David Michael Fabian ("Fabian Cert."), Ex. A at ¶ 4.5 therein.) This prohibition is referred to as the "Pre-Closing Net." On June 19, 1996, Paradyne employees were advised of the sale and, further, that their retirement benefits under the AT&T Plan would be discontinued. (FPO at 8, ¶ 16.) In effect, the Pre-Closing Net extended the prohibition on Paradyne employees' ability to transfer employment to AT&T affiliates.

The Paradyne deal closed on July 31, 1996. (*Id.* at 8, ¶14.) At the closing, parties to the transfer executed the "Employee Matters Agreement," which extended the Pre-Closing Net for eight months after the closing. (*Id.* at 8, ¶ 18.) Plaintiffs claim that the Preliminary Net, the Pre-Closing Net, and the Employee Matters Agreement (collectively the "Nets") guaranteed that they could not enjoy the AT&T Plan's benefit of bridging their accrued retirement credit by becoming re-employed by another AT&T company within six months. (*Id.* at 8, ¶ 25.) Plaintiffs claim that this interfered with accrual of their retirement benefits solely for the purpose of increasing the defendants' profits. (*Id.* at 8, ¶ 19.)

B. Procedural History

As a result of these events, plaintiffs filed a number of cases that resulted in the instant consolidated matter, *Eichorn*

v. AT&T Corp., 96-3587 (hereinafter "*Eichorn*").[2] Plaintiffs

2. *Eichorn* was filed on July 24, 1996 by a putative class action of Paradyne employees against AT&T, Lucent, and TPG. The second action, *Daly v. AT&T Corp.*, 96-4674 (MLC) (hereinafter "*Daly*"), was filed on October 3, 1996 and, on November 20, 1996, was consolidated with *Eichorn*. By order dated March 29, 1999, the Honorable Mary L. Cooper granted summary judgment to the defendants in those actions dismissing plaintiffs' antitrust claims. [Docket Entry No. 42.] By order dated August 23, 1999, Judge Cooper denied plaintiffs' application for class discovery and dismissed plaintiffs' ERISA claims. [Docket Entry No. 48.] Plaintiffs appealed Judge Cooper's decisions.

While *Eichorn* was on appeal, plaintiffs' counsel filed *Lawless v. AT&T Corp.*, 00-0081 (hereinafter "*Lawless*") and *Brugner v. AT&T Corp.*, 00-3008 (hereinafter "*Brugner*"). The claims in *Lawless* and *Brugner* arose from the same facts as *Eichorn* and differed only insofar as they were not putative class actions, and they named NCR and CIT as defendants.

The Court of Appeals for the Third Circuit affirmed Judge Cooper's decision with respect to plaintiffs' antitrust claims, but reversed her ruling with respect to the ERISA claims. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 150 (3d Cir. 2001) (holding "plaintiffs have presented sufficient circumstantial evidence of intent to interfere with their pension rights to create a genuine issue of material fact."). The Court of Appeals for the Third Circuit did not address whether or not the relief that plaintiffs sought was recoverable under Section 502 of ERISA. For this reason, the instant motion does not seek to overturn what is now law of the case, as plaintiffs argue. (*See* Pl.'s Br. at 2-3.)

Accordingly, plaintiffs' ERISA claims were remanded to this Court with the direction that the District Court address plaintiffs'

(Cont'd)

alleged that the Nets violated Section 1 of the Sherman Act and had the effect of "interfering with the attainment of certain rights with respect to plaintiffs' benefits in violation of ERISA Section 510. [Docket Entry No. 1.] Only the ERISA claims remain.

On December 12, 2003, TPG filed a motion to strike testimony and related calculations of plaintiffs' damages witness, Stephen A. Crowley, and to enter summary judgment in defendants' favor. [Docket Entry No. 149.] On August 18, 2004, the Court granted defendants' motion to strike plaintiffs' damages witness and requested supplemental briefing on whether or not plaintiffs should be permitted to make additional damages submissions. [Docket Entry No. 156.] On November 10, 2004, after supplemental briefing, the Court entered an Order that (1) barred plaintiffs from submitting Mr. Crowley's calculations, reports, and testimony; (2) denied plaintiffs leave to add expert witnesses or submit calculations, reports, or testimony of such witnesses; (3) denied defendants' motion for summary judgment; (4) expressly reserved on the issue of "whether plaintiffs can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiff's pension benefits"; and (5) directed the parties to confer with Magistrate Judge Hughes to schedule discovery on remaining damages issues. [Docket Entry No. 163.]

(Cont'd)

motion for class discovery. *Eichorn*, 248 F.3d at 150. On August 28, 2001, *Lawless* and *Brugner* were consolidated with *Eichorn*. [Docket Entry No. 66.] The case was reassigned to the Undersigned on December 20, 2002. [Docket Entry No. 95.]

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Defendants filed the instant motion on May 19, 2005. [Docket Entry Nos. 173 & 174.] In their motion, the defendants generally argue that ERISA Section 502(a) does not allow recovery for plaintiffs' claims. (*See* Def.'s Br. at 4-13.) Defendants argue that plaintiffs' only possible theories of recovery are under Sections 502(a)(1)(B) and Section 502(a)(3). (*Id.* at 5-7.) Defendants argue plaintiffs cannot recover under Sections 502(a)(1)(B) because they allege that the defendants interfered with their ability to obtain rights under the AT&T Plan, not the breach of the Plan provision, which is the sole conduct for which that section provides a remedy. (*Id.* at 7.) Defendants further argue the compensatory damages that plaintiffs seek are not "appropriate equitable relief" under Sections 502(a)(3). To address these arguments, the Court must analyze the alleged conduct at issue and the nature of plaintiffs' claimed damages.

C. Defendants' Alleged Conduct

Plaintiffs do not seek recovery for a breach of the AT&T Plan, but for interference with benefits to which they would have been entitled had they remained subject to the AT&T Plan. Specifically, plaintiffs claim that the purpose of the Nets was to "thwart the predictable efforts of Paradyne employees to find employment with other units of the former AT&T organization, thereby preventing them from remaining as vested participants in an ongoing pension plan with the right to add more service time to their existing pension credits." (FPO at 9, ¶ 22.) Plaintiffs claim that the Nets had the effect of "preventing the Paradyne workers from attaining or enjoying the benefits of the pension-bridging provisions to which they are entitled as pension plan participants."

(*Id.* at 13, ¶ 46.) In their motion papers, plaintiffs state that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.)

D. Plaintiffs' Alleged Damages

On June 27, 2005, United States Magistrate Judge John J. Hughes entered the Final Pretrial Order in this case. [Docket Entry No. 194.] Item 6.B.[3] of the Final Pretrial Order states that plaintiffs will call 25 former Paradyne employees and "[a]ll such testimony will correspond closely to information provided in depositions and responses to written discovery requests, the answers to interrogatories propounded by defendants . . . near the end of 2004 in particular." (*Id.* at 30.) The answers to interrogatories to which plaintiffs refer are attached to Mr. Fabian's certification as Exhibits H through DD. The relevant interrogatory, number 5, asked plaintiffs to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." (*See, e.g.*, Fabian Cert., Ex. H at 5.) Plaintiffs' interrogatory answers

3. Part 4.B. of the Final Pretrial Order requires plaintiffs to list each contested fact they intend to prove with respect to damages, including "each item of damages, the amount of each item, [and] the factual basis for each item . . . ." (FPO at 13, Part 4.B.) In response to this, plaintiffs state "the factual showing as regards to damages is set forth in Section 6.B. below." (*Id.*)

reflect calculations, pursuant to various formulae[4], of money they would have received but for the defendants' alleged interference. By way of example, in her March 20, 2005 response to the damages interrogatories, plaintiff Judith B. Brugner set forth the calculation by which she claimed that her damages amount to $298,252.57. (*Id.*, Ex. H at 6-7.) Ms. Brunger stated:

> I base these damage calculations on taking retirement on January 15, 2000 after reaching 20 years' service to qualify for an unreduced service pension under the Transition Benefit Formula which is applicable to employees who became eligible for retirement during the period from January 1, 1997 to December 31, 2000, and is based on earnings from 1991 through 1996.

(*Id.*, Ex. H at 6-7.) After applying the proposed formula, Ms. Brunger concluded:

> The combination of the accrued pension payments with interest thereon that I should have received

4. The calculations involve an application of different formulae that the plaintiffs claim apply to the AT&T Plan, including the "Transition Formula" (*see* Fabian Cert., Ex. H at 5-7; Ex. I at 4-6; Ex. Q at 4-7; and Ex. R at 5-7), the "Lucent Retirement Income Plan Service Program Summary Plan Description effective 1/1/2000, updated 11/20/2000" (*see id.*, Ex. J at 15-16; Ex. K at 5; Ex. L at 5-6; Ex. M at 4-5; Ex. P at 6-9; Ex. U at 6-8; Ex. W at 5-6; and Ex. Y at 4-7), and the like (*see id.*, Ex. N at 4-5; Ex. O at 4-5; Ex. S at 4-6; Ex. T at 4-6; Ex V at 4-7; Ex. X at 5-7; Ex. Z at 5-7; Ex. AA at 4-6; Ex. BB at 4-5; and Ex. CC at 5-7.). The details of these formulae are not relevant to this opinion.

> through April 30, 2005 ($128,290.35) plus my additional damages for lost pension benefits subsequent to that date as determined by the cost of an annuity ($169,962.22) results in total damages of $229,252.57.

(*Id.*, Ex. H at 7.) The interrogatory responses do not state that the plaintiffs seek equitable relief, but rather frame the plaintiffs' damages solely in terms of a monetary amount.

Plaintiffs' legal theories, referred to in part 13 of the Final Pretrial Order, preserved the following legal issues:

> 3. Should Lucent and/or AT&T be compelled in the exercise of the Court's equitable jurisdiction to adjust plaintiffs' existing pension rights by crediting them with the service time they failed to accrue as a result of the no-hire agreement?
>
> 4. Have plaintiffs correctly calculated the monetary values of the pension benefits lost through interference with their ability to continue holding pension-bearing employment up to the present time, or such sooner time as would have qualified them to receive pension benefits?

(FPO at 86.) While issue 3 mentions the "Court's equitable jurisdiction," it does not reference the equitable remedy sought, such as specific performance, injunction, or an equitable lien.

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Plaintiffs' opposition to the instant motion introduces the concept of an "equitable decree" but does not elucidate the remedy they seek. With respect to Section 502(a)(1)(B), plaintiffs argue that their recovery:

> involves no more than the simple task of determining what amount of pension service time plaintiffs lost through violation of § 510, adding that service time to the time already recorded for their former service, and recalculating their pension benefits *mutatis mutandis*[5] under the plan formula. It is a process that can easily be viewed as an illustration of the maxim that equity regards as done what ought to be done.

(Opp. Br. at 5) (citations and internal quotation marks omitted, footnote added). With regard to Section 502(a)(3), plaintiffs argue they seek "pay only in the sense that pensions were part of their total compensation, and a decree which remedies the denial of their right to continue earning pension credits up to the present time will serve essentially the same purpose as a conventional back pay award." (Pl.'s Br. at 15.) Plaintiffs further argue "any award for sums adjudged due as 'back pay' pension benefits will necessarily be ancillary to an equitable decree crediting plaintiffs with the additional service." (*Id.* at 16.)

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5. *Mutatis Mutandis* means "[a]ll the necessary changes having been made; with the necessary changes." Black's Law Dictionary 832 (7th ed. 2000).

Appendix D

III. DISCUSSION

A. Summary Judgement Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). An issue is "genuine" if a reasonable factfinder could possibly hold in the nonmovant's favor with regard to that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. *Id.* at 248. At the summary judgment stage, a court may not weigh the evidence or make credibility findings; "these tasks are left for the fact-finder." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Therefore, to raise a genuine issue of material fact, "'the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Id.*; *see also Anderson*, 477 U.S. at 252 (holding "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]."). In short, summary judgment is proper in the event that, even taking all factual disputes in a light most favorable to the plaintiff, relief could not be granted.

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B. Plaintiffs' ERISA Claim

Plaintiffs' claims are grounded in Section 510 of ERISA, 29 U.S.C. § 1140. Section 510 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

Section 502 is the civil enforcement provision of ERISA and provides certain remedies for the breach of ERISA sections such as 510. 29 U.S.C.A. § 1132. Section 502 provides that a civil action may be brought:

> (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant beneficiary or fiduciary for appropriate relief under section [409 of ERISA]; [and]
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of the subchapter or the terms of

> the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan.

29 U.S.C. § 1132. Plaintiffs seek recovery under Section 502(a)(1)(B) and Section 502(a)(3).

1. ERISA Section 502(a)(1)(B)

Defendants argue that Section 502(a)(1)(B) does not provide a remedy for plaintiffs' Section 510 claims because plaintiffs claim the Nets interfered with their ability to accrue benefits under the AT&T Plan, rather than a breach of the AT&T Plan itself. (Def.'s Br. at 7.) In opposition, plaintiffs argue that both legal and equitable relief, namely the recovery of pension benefits, enforcement of plan rights, and clarification of future benefits, are recoverable under Section 502(a)(1)(B). (Pl.'s Opp. Br. at 3-8.) For the following reasons, the Court holds that plaintiffs cannot recover under Section 502(a)(1)(B) as a matter of law.

Section 510 "is not concerned with whether a defendant complied with the contractual terms of an employee benefit plan. Rather, the emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan." *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir.

1992). In this regard, the Court of Appeals for the Seventh Circuit has stated:

> In order to enforce the terms of a plan under Section 502, the participant must first qualify for the benefits provided in that plan. *See* 29 U.S.C. § 1132. Rather than concerning itself with these qualifications, one of the actions which Section 510 makes unlawful is the interference with a participant's ability to meet these qualifications in the first instance.

Id. at 1134 (citations omitted). Therefore, Section 510 is aimed at prohibiting interference with the rights of plan beneficiaries. Section 502(a)(1)(B), on the other hand, provides a remedy for the assertion of a contract right under an employee benefit plan. *Id.* at 1133. Thus, a violation of Section 510 (prohibition of *interference with the attainment of a right* to which a participant "may become entitled under a plan") is inconsistent with the remedy provided under Section 502(a)(1)(B) (recovery of benefits "*due . . . under the terms of his plan*").

The United States District Court for the Eastern District of New York drew the same distinction in *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 150 (E.D.N.Y. 1996). In *Russell*, the plaintiff sued his employer when he was fired just months shy of his twentieth anniversary with the company, at which time he would have been entitled to 65% of his pension once he reached age 50. *Id.* at 146. Plaintiff alleged that defendant terminated his employment to interfere with his rights under the pension plan. *Id.* In dismissing

plaintiff's claims under ERISA Section 502(a)(1)(B), the *Russell* court noted that alleged violations of Section 502(a)(1)(B) "must be of the *terms* of the plan to be actionable." *Id.* at 150 (emphasis in original) (citations omitted). Accordingly, the District Court held that the plaintiff could not recover under Section 510, through Section 502(a)(1)(B), because he sought redress for interference with the *entitlement* to benefits for which he had not yet qualified, and not *breach* of a term of the plan. *Id.*

Defendants' alleged conduct here cannot form the basis for recovery under Section 502(a)(1)(B). As in *Russell*, plaintiffs do not claim entitlement to relief already owed to them under the Plan, but from interference with their ability to obtain benefits. Specifically, plaintiffs claim that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.) Plaintiffs' attempt to recover money to which they would have been entitled but for the Paradyne transfer appears to be the very remedy that the *Russell* court held is not recoverable under Section 502(a)(1)(B). For the reasons stated in that case, therefore, the Court holds that plaintiffs cannot recover under Section 502(a)(1)(B) for a breach of Section 510.

Plaintiffs argue that *Varity Corporation v. Howe*, 516 U.S. 489 (1996) supports their claim under Section 502(a)(1)(B). *Varity* held, in part, that plaintiffs who claimed a breach of fiduciary duty under Section 409 of ERISA could not proceed under Section 502(a)(1)(B) "because they were no longer members of the . . . plan and, therefore, had no

'benefits due [them] under the terms of [the] plan.'" 516 U.S. at 515. Plaintiffs argue this is a tacit recognition that, had the plaintiffs in *Varity* been members of the plan, as plaintiffs in this case are, they could have proceeded under Section 502(a)(1)(B). (Pl. Br. at 7-8.) The majority in *Varity*, however, did not hold that a plaintiff alleging a violation of 510 can proceed under Section 502(a)(1)(B) if they were plan participants, nor did the court address the propriety of extra-contractual damages under Section 502(a)(1)(B). Notably, the dissent in *Varity*, citing prior Supreme Court precedent, stated as follows:

> Section 502(a)(1)(B) deals exclusively with contractual rights under the plan. It allows a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." As we recognized in *Russell*, this provision "says nothing about the recovery of extracontractual damages."

516 U.S. at 521 n.2 (Thomas, J., dissenting) (citing *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 144 (1985)). Accordingly, this Court's previous analysis applies to plaintiffs' argument under *Varity*. Because plaintiffs seek damages for interference with their rights, not breach of obligations under the AT&T Plan, Section 502(a)(1)(B) does not offer them a remedy. The Court does not read *Varity* to contradict this proposition.

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2. ERISA Section 502(a)(3)

Unlike the Court's analysis with respect to Section 502(a)(1)(B), the issue whether or not plaintiffs may proceed under Section 502(a)(3) requires the Court to focus on the *type* of damages sought.

Defendants characterize plaintiffs' alleged damages as "back pay." As such, they argue, plaintiffs' damages are remedies at law and, therefore, not recoverable under Section 502(a)(3), which allows only "appropriate equitable relief." (Def.'s Br. at 8-13.) Plaintiffs argue they are seeking back pay "only in the sense that pensions were part of their total compensation, and a decree which remedies the denial of their right to continue earning pension credits up to the present time will serve essentially the same purpose as a conventional back pay award." (Pl.'s Br. at 15.) For the reasons that follow, the Court holds that the relief plaintiffs seek is not "appropriate *equitable* relief" under Section 502(a)(3).

As stated previously, ERISA Section 502(a)(3) allows recovery "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or terms of the plan." 29 U.S.C. § 1132. Thus, recovery under Section 502(a)(3) is limited to equitable relief. "Equitable relief" under Section 502(a)(3) means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993). The present motion requires the Court to determine whether or not the relief that plaintiffs seek is

"equitable" in nature and, therefore, recoverable under this section.

It is undeniable that plaintiffs seek money they claim is due as a result of the defendants' alleged wrongdoing. Generally, such a recovery can only proceed under Section 502(a)(3) where (1) the damages are restitutionary in nature; or (2) where the back pay is incidental to a form of injunctive relief, such as reinstatement. *Russell,* 921 F. Supp. at 153. Plaintiffs' damages are neither.

i. Restitution

While "restitution" is among those remedies "typically available in equity," *Mertens,* 508 U.S. at 257, not all restitution constitutes "appropriate equitable relief" under Section 502(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson,* 524 U.S. 204 (2002) the Supreme Court distinguished between equitable restitution, which is recoverable under Section 502(a)(3), and legal restitution, which is not. In that case, the plaintiff, the insurer of an ERISA plan, sued the wife of a plan participant who was involved in a car accident and recovered medical benefits from the plan. 534 U.S. at 207. Plaintiff sought recovery under the reimbursement provision of the plan, for amounts the defendant recovered from a third-party in a tort action. *Id.* at 207-08. Plaintiff argued the damages it sought were "equitable" under *Mertens* and, therefore, recoverable under Section 502(a)(3). *Id.* at 210. In rejecting *Great-West*'s argument, the court reasoned as follows:

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In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. 1 Dobbs § 4.2(1), at 571. *See* also Muir, *supra,* at 37. In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Restatement of Restitution § 160, Comment *a*, pp. 641-642 (1936). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

In contrast, a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. *See* 1 Dobbs § 4.3(1), at 587-588; Restatement of Restitution, *supra,* § 160, Comment *a*, at 641-642; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978). A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.

> But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, § 215, Comment *a*, at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West, 534 U.S. at 213-14 (emphasis in original). With this standard in mind, the Court turns to plaintiffs' alleged damages.

Plaintiffs have expressly abandoned any claim to restitution. In their opposition brief, plaintiffs state that they "have no need for a theory of recovery grounded on 'restitution.'" because they seek "relief from conduct in violation not of a private contract but ERISA itself . . . ." (Pl.'s Br. at 15.) Accordingly, the Court need not reach the issue of whether or not plaintiffs' purported damages are the sort of restitution typically available in equity.

Had it reached the issue, however, the Court would hold that the relief that plaintiffs seek is not equitable in nature and, therefore, not recoverable under Section 502(a)(3). As a general matter, the forced transfer of funds from the defendants to the plaintiffs "would not be a viable remedy because '[a]lmost invariably . . . suits seeking . . . to compel

the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty.'" *Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 445 (S.D.N.Y. 2002). Plaintiffs do not seek recovery of money to which they are entitled, but rather recovery of benefits to which they would have been entitled had defendants not interfered with their rights. For example, in their Final Pretrial Order, plaintiffs preserve as a legal issue whether or not they have correctly calculated the monetary value of lost benefits due to defendants' "interference with their ability to continue holding pension-bearing employment up to the present time, or such sooner time as would have qualified them to receive pension benefits." (FPO at 86.) Moreover, in their Opposition Brief, plaintiffs claim that the Nets "impede[d] their continued participation in the AT&T/Lucent pension plan," and that "such action constituted interference with the attainment of an ERISA-protected right." (Pl.'s Br. at 2.) Thus, their recovery is not for the turn-over of a thing to which they are entitled, it is for the award of money damages. This theory falls squarely within what the *Great-West* court held to be "restitution at law," 534 U.S. at 213, which is not recoverable under Section 502(a)(3).[6]

6. Nor have the plaintiffs argued that the remedy they seek amounts to an equitable lien or constructive trust. *See, e.g., Great-West*, 534 U.S. at 213 (holding restitution in equity is recoverable under Section 502(a)(3) "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."). Thus,

(Cont'd)

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ii. Incidental to Equitable Relief

Plaintiffs argue that damages are recoverable under Section 502(a)(3) because they are an integral part of an equitable remedy. (Opp. Br. at 16.) Plaintiffs state this differently by arguing "any award for sums adjudged due as 'back pay' pension benefits will necessarily by ancillary to an equitable decree crediting plaintiffs with the additional service." (*Id.*) Defendants argue that plaintiffs' recasting their damages as the recovery of lost benefits still constitutes the type of compensatory relief that is not recoverable under Section 502(a)(3). (Reply Br. at 10.)[7]

(Cont'd)
the Court need not decide whether or not the plaintiffs' alleged damages are sufficiently traceable to funds within the defendants' possession. *Compare Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 214 (3d Cir. 2004) (holding plaintiffs sufficiently identified the interest of wrongfully withheld funds so as to render it "readily traceable" under *Great-West); with Horvath v. Keystone Health Plan East*, 333 F.3d 450, 457 n.3 (3d Cir. 2003) (noting "there are no funds readily traceable to [plaintiff] over which a constructive trust or other equitable remedy may be imposed.").

7. Defendants also argue that plaintiffs are "barred by the Court's Order of November 10, 2004" from "recharacteriz[ing] their damages as lost pension benefits." (Reply Br. at 10.) The Court's November 10, 2004 Order, however, reserved on the issue of "whether plaintiffs can quantify or establish *any right to 'back pay' and/or equitable relief* increasing plaintiff's pension benefits." [Docket Entry No. 163] (emphasis added). It appears, therefore, plaintiffs are not barred from at least arguing their damages are equitable in nature.

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Plaintiffs rely on footnote 4 in the *Great-West* decision. In that footnote, the majority rejected Justice Ginsburg's dissenting argument that Congress has treated back pay as a type of restitution and, therefore, "equitable" for the purpose of Title VII of the Civil Rights Act of 1964. 534 U.S. at 218 n.4; *see also Strom v. Goldman Sacks & Co.*, 202 F.3d 138, 143-150 (2d Cir. 1999) (holding the recovery of life insurance proceeds that the plaintiff would have received but for defendants' breach of fiduciary duty, as with the National Labor Relations Act and Title VII, was a form of "equitable relief" under Section 502(a)(3)). For this assertion, the dissent cited *Curtis v. Loether,* 415 U.S. 189, 197 (1974) and *Teamsters v. Terry,* 494 U.S. 558, 572 (1990). The court reconciled this authority by stating, first, that "these cases do *not* say that *since* [the remedy sought] is restitutionary, it is *therefore* equitable." 534 U.S. at 218 n.4 (emphasis in original). The majority further noted that Congress had treated back pay as equitable relief in Title VII cases only in the narrow sense that it allowed back pay to be awarded "together with equitable relief." 534 U.S. at 218 n.4. (quoting 42 U.S.C. § 2000e-5(g)(1), which expressly permits a court to order "affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."). The majority stated this language can only be "understood to mean that Title VII backpay was 'specifically' made part of an equitable remedy." *Id.* The majority concluded that the remedy sought by *Great-West* — namely the reimbursement of medical benefits in the amount the beneficiary's tort recovery from a third-party -- was "a freestanding claim for

money damages" and "Title VII has nothing to do with the case." *Id.*[8]

First, the plaintiffs have not preserved their right to the "equitable decree" that they now purport to seek. Rather, with respect to damages, plaintiffs stated they will call 25 former Paradyne employees whose testimony "will correspond closely to information provided in depositions and responses to written discovery requests, the answers to interrogatories propounded by defendants . . . near the end of 2004 in particular." (*Id.* at 30.) The interrogatory responses to which the Final Pretrial Order refers reflect compensatory damages in the amount that plaintiffs claim they have lost because of defendants' conduct. (*See, e.g.*, Fabian Cert., Ex. H at 6-7.) The responses do not state that the plaintiffs seek equitable relief, but rather frame their damages solely in terms of a monetary amount. In *Mertens*, the Supreme Court excluded such compensatory damages from those recoverable as "appropriate equitable relief" under Section 503(a)(3). 508 U.S. at 257 (holding "equitable relief" under Section 502(a)(3) is limited to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, *but not compensatory damages).*" (emphasis added)); *see also Kishter*, 186 F. Supp. 2d at 438.

Second, even if plaintiffs preserved their right to appropriate equitable relief under Section 502(a)(3), footnote 4 of the *Great-West* opinion does not support their claim.

8. In *Kishter v. Principal Life Insurance Co.*, the United States District Court for the Southern District of New York recognized that "the Second Circuit's reasoning in *Strom* has been superseded by *Great-West* . . . ." 186 F. Supp. 2d at 445.

Indeed, the majority stated that the dissent's argument by analogy could only be given credence if Title VII expressly included back pay as equitable relief as a matter of statute. 534 U.S. at 218 n.4. Contrary to 42 U.S.C. § 2000e-5(g)(1), Section 502(a)(3) makes no mention of "back pay" and certainly does not specifically make it part of an equitable remedy. Plaintiffs cite no other legal authority for their argument that their claim to back pay and benefits are recoverable under Section 502(a)(3) because they are ancillary to an equitable decree. Indeed, the weight of legal authority would prohibit plaintiffs from recovering the damages they seek. *See Nicolau v. Horizon Media, Ins.*, No. 01 CIV. 0785, 2003 WL 22208356, at *3 (S.D.N.Y Sept. 23, 2003) (dismissing plaintiffs' claim for lost wages and other money damages, where plaintiffs did not seek reinstatement or any other form of equitable relief, "[b]ecause neither lost wages nor other money damages constitute an equitable remedy . . . ."), *reh'g granted* 2003 WL 22852680 (S.D.N.Y. Oct. 15, 2003), *rev'd on other grounds*, 402 F.3d 325 (2d Cir. 2005); *Pace v. Matsushita Elec. Corp. of America*, 257 F. Supp. 2d 543, 563 (E.D.N.Y. 2003) (holding the Great-West decision abrogated *Strom's* "'make-whole' remedial scheme."); *Bona v. Barasch*, No. 01-civ-2289, 2003 WL 1395932, at *12 (S.D.N.Y. March 20, 2003) (holding since the plaintiffs' "claim for monetary relief is nothing more than a claim for money damages as compensation for losses," they were barred from recovery under Section 503(a)(3)); *Kishter*, 186 F. Supp. 2d at 438. Given this authority, and the absence of authority supporting plaintiffs' recovery, the Court holds that plaintiffs' purported damages, as described in their brief and answers to interrogatories, are not recoverable under Section 502(a)(3).

Third, the plaintiffs' efforts to cloak their damages in the garb of an "equitable decree" does not advance their argument. In *Great-West,* the Supreme Court held that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." 534 U.S. at 210-11. While plaintiffs disclaim any resort to equitable relief, their purported "equitable decree" is on all fours with the type of "legal restitution" that the *Great-West* case held was not recoverable under Section 502(a)(3). Thus, plaintiffs' calling the award of back pay-type damages an equitable decree will not save their claim. *See id.* at 255 (holding "[a]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* . . ."). In short, given that the only remedies available under Section 502(a)(3) are those "typically available in equity," *Mertens,* 508 U.S. at 257, plaintiffs cannot be heard to seek the forced transfer of money.

Finally, plaintiffs distinguish their claims from those of the plan in *Great-West* in that plaintiffs seek recovery for a violation of ERISA itself, "not of a private contract." (Pl.'s Br. at 15.) Section 503(a)(3) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce *any provisions of this subchapter or terms of the plan.*" 29 U.S.C. § 1132 (emphasis added). This section makes no distinction between remedies for violation of ERISA and remedies for violation of the terms of a plan. Even if plaintiffs' argument were given credence, however, they cite no legal authority for the proposition that breach of ERISA, presumably Section 510, rather than a

breach of the terms of a plan, converts their alleged damages into an "appropriate equitable remedy" under Section 502(a)(3). Therefore, the Court finds this argument unpersuasive.

III. CONCLUSION

For all of these reasons, the Court grants defendants' motion for summary judgment. An appropriate Order will follow.

November 22, 2005

s/ Stanley R. Chesler
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 22, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler, U.S.D.J.

Civ. No. 96-3587

KURT H. EICHORN, et al.,

plaintiffs,

v.

AT&T CORP.; LUCENT TECHS. INC.; TEXAS PACIFIC GROUP; NCR CORP.; THE CIT GROUP, INC.; AND "JOHN DOE" CORPS. 1-10,

defendants.

ORDER

This matter having come before the Court on a motion by the defendant Texas Pacific Group, in which defendants Lucent Technologies, Inc., AT&T Corporation, and NCR Corporation join, pursuant to Rule 56, for summary judgment against the plaintiffs [Docket Entry Nos. 173 & 174]; and the Court having considered the arguments set forth in the parties' submissions; and for the reasons set forth in the Court's Opinion issued on the date hereof,

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IT IS on this 22nd day of November, 2005

ORDERED that defendants' motion for summary judgment [Docket Entry Nos. 173 & 174] is hereby **GRANTED**;

IT IS FURTHER ORDERED that plaintiffs' claims for damages under ERISA Section 502 are **DISMISSED**; and

IT IS FURTHER ORDERED that all pending motions are hereby **TERMINATED**.

s/ Stanley R. Chesler
United States District Judge